88-1916

No. 89-____

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT DARREN OLSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTIONS PRESENTED

1. After successfully eluding the police following an armed robbery and murder, defendant sleeps overnight on the floor at a friend's home. He has no key to the home, is never left alone there and has no possessions other than a few extra clothes in a bag. Does defendant have a legitimate expectation of privacy in the friend's home to enable him to challenge his warrantless arrest there under the Fourth and Fourteenth Amendments to the United States Constitution?

2. At 2:00 p.m. on a Sunday the police establish probable cause to believe defendant is an accomplice in an aggravated robbery and murder that occurred the day before. Police also have reason to believe that defendant is temporarily staying in a particular duplex; that he may be armed; and that he may be preparing to flee. Approximately an hour later, when police learn that defendant and his friends are present at that address, they surround the duplex. They telephone into the duplex and confirm defendant's presence and his refusal to come out. Under these circumstances, must police continue to stake out the building while obtaining a warrant, or is an immediate warrantless entry to arrest justified by exigent circumstances under the Fourth and Fourteenth Amendments to the United States Constitution?

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The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on February 24, 1989.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced and attached to this Petition as Appendix A, is reported at 436 N.W.2d 92 (Minn. 1989). The opinion of the Hennepin County District Court, reproduced and attached to this Petition as Appendix C, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on February 24, 1989. The State filed a timely Petition for Rehearing, which is reproduced and attached to this Petition as Appendix D, on March 6, 1989. The Minnesota Supreme Court's summary denial of that Petition for Rehearing, reproduced and attached to this Petition as Appendix B, was filed on March 28, 1989. This petition for a writ of certiorari was filed within sixty days of the court's denial of rehearing.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a) (1989).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

On Saturday morning, July 18, 1987 a lone gunman entered a gas station in Minneapolis with an automatic weapon. Without a word, the man shot the young manager of the store in the back of the head. Then he robbed the other three employees of the station at gunpoint. Police were quickly alerted. Because the description of the robber fit Joseph Ecker, a man suspected of committing several robberies in the area, police officers went to Ecker's home within minutes of the robbery/murder. A brown Oldsmobile pulled up at Ecker's home at the same time as the police car. When the driver saw the squad car, he put his car in reverse and sped backwards; the car spun out of control and came to a stop. The driver and one other male jumped out of the car and fled on foot. Officers gave chase and quickly arrested Joseph Ecker, the passenger of the car, inside his home. The other man escaped. Ecker was later identified as the gunman who entered the station to commit the crime.

Inside the abandoned Oldsmobile police found the stolen money and the murder weapon, as well as various documents linking Respondent Robert Darren Olson to the car. They also found in the car a pellet gun in the shape of a revolver, a knife, a knife sheath and two empty shoulder holsters for handguns (R.85, 99; T.224, 341, 345, 369-70).[1]

Police continued to investigate. On the morning of the next day, Sunday, police received a tip that a man named "Rob" was the driver of the getaway car and was planning to leave town by bus (R.110-12, 129). Police officers were dispatched to the bus depot (R.129-130). At noon the tipster called again.

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[1] "R" refers to the transcript of the pretrial ("Rasmussen") hearing. "T" refers to the trial transcript.

She identified herself[2] to Sgt. DeConcini, the investigating officer, and told him that "Maria," who lived on Garfield Avenue N.E., had told her that "Rob" had admitted to her (Maria) and to "Louann and Julie" at 2406 Fillmore Avenue N.E. that he was the driver for the gas station robbery and murder (R.113-14, 122). Police officers went to 2406 Fillmore, a duplex, to try to verify the tip (R.114, 132, 148-50). They were unable to find Louann or Julie, but the person living in the lower portion of the duplex identified herself as Louann's mother and verified that Louann and Julie Bergstrom lived upstairs. She told police that Respondent had been staying with Louann and Julie for a day or so, but that they were not home now. She agreed to call police when they returned (R.114-115, 132-33, 142-44, 147, 148-50).

At 2:00 p.m., shortly after he received this information, Sgt. DeConcini issued a "pickup order" for Respondent (R.115-117, 131; T.430). He did not attempt to get an arrest warrant (R.129).[3] He instructed his officers to stay away from the duplex until he received the call that Respondent had returned.

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[2] The actual identity of the informant is unknown. The woman identified herself as "Diana Murphy" and gave an address and telephone number (R.113). A woman named Diana Humphrey, whose address and telephone number matched that given by the tipster, testified that she knew Louann and Julie but that she did not call the police (R.168-176).

[3] Rules 2 and 3 of the Minnesota Rules of Criminal Procedure provide that an arrest warrant must be combined with a criminal complaint, which requires a county attorney's signature as well as judicial approval. 49 Minn. Stat. Ann.R.Cr.P. 2, 3. Sgt. DeConcini testified he did not attempt to obtain a warrant because it was Sunday, the county attorney's office was not open, and the tip gave him reason to believe that Respondent intended to flee (R.116, 129). He stated he did not know how long it would take to obtain an arrest warrant/complaint on Sunday in Hennepin County because he had never tried to obtain one on a weekend (R.130).

At approximately 2:45 p.m. the downstairs resident called and told DeConcini that Respondent and the others had returned (R.117-18). DeConcini ordered his officers to surround the home. After they arrived, but before they tried to enter, DeConcini called the home. A woman who identified herself as "Julie" answered the telephone. DeConcini told her to tell Respondent to come out of the house, that police were waiting for him. There was a pause, and then DeConcini heard a male voice in the background saying, "tell them I left." Julie came back on the phone and said "[Respondent] has left already" (R.118, 124; T.431, 433-34). DeConcini then directed the officers to enter the house.[4] They found Respondent hiding behind furniture and toys in the back of a small closet on the third floor attic of the building (R.118, 139-41; T.408-411). He was then arrested, and shortly after 3:00 p.m. police obtained a statement from him, in which he admitted driving Ecker to and from the crime scene but denied any involvement in the crime (R.157-163; T.379-396).[5]

In August 1987 Respondent and Joseph Ecker were indicted by a Hennepin County, Minnesota grand jury on charges of

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[4] There is no dispute that police entered with guns drawn. In his Reply to the State's Petition for Rehearing Respondent characterized the police entry as a "storming of a dwelling" and quoted portions of Julie Bergstrom's testimony at the pretrial hearing in which she claimed to have been mistreated by police. Her testimony, however, was not supported by that of her mother, Julie's boyfriend or the police officers, and the trial court did not make such a finding of excessive force or mistreatment (*See* R.137-38, 145-46, 182-192, 208-211 and Appendix C at A-16-19.)

[5] Subsequent police investigation revealed that the car used in the crime belonged to Appellant and that the murder weapon probably also belonged to Appellant (T.390, 475-500, 507-08).

first degree felony murder, aggravated robbery and second degree assault.[6]

At a pretrial hearing Respondent moved to suppress his post arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution (*See* Appendix C). Respondent argued that he had a legitimate expectation of privacy in the Bergstrom duplex and therefore the warrantless police entry to arrest him violated the principles set forth in *Payton v. New York*, 445 U.S. 573 (1980).[7] The State argued in response that Respondent lacked the necessary "standing" to contest the legality of his arrest and that in any event exigent circumstances justified the warrantless arrest.

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[6] Minnesota Statutes §609.185 (3) (1987) provided in relevant part:
Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

* * * * *

(3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . aggravated robbery. . . . .

Minnesota Statutes § 609.245 (1987) provided as follows:
Whoever, while committing a robbery, is armed with a dangerous weapon or inflicts bodily harm upon another is guilty of aggravated robbery and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000 or both.

Minnesota Statutes §609.222 (1987) provides as follows:
Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

[7] Respondent also claimed that to the extent the police relied on information from a "fictitious informant," they lacked sufficient probable cause to arrest under the Fourth and Fourteenth Amendments to the United States Constitution. The trial court found that the information provided by the informant was sufficiently corroborated to justify police reliance, and that the tip, as well as the other incriminating evidence found in the getaway car, provided sufficient probable cause for Respondent's arrest (Appendix C at A-22-25). On appeal the Minnesota Supreme Court discussed, but did not reach, the issue of probable cause to arrest (Appendix A at A-5-7).

Testimony presented at the hearing revealed the following facts with respect to Respondent's connection with the duplex: Respondent had been staying with Ecker at Ecker's home for at least ten days before the crime; after Respondent's narrow escape from police which resulted in Ecker's arrest in his home, Respondent did not wish to return there (R.220-21). Although they had not known him long, Julie Bergstrom and her mother, Louann, agreed to allow Respondent to stay with them for a day or two in their upper duplex (R.182, 184, 194-95, 198, 216). At the time of his arrest Respondent had slept on the floor for one night; also sharing the home that night was Julie's boyfriend (R.182, 189, 191, 208-09). Respondent had no legal interest in the duplex and did not have a key. Although he kept a few extra clothes in a bag at the home, he had no closet, dresser, or even a toothbrush, at the duplex (R.220). Julie Bergstrom testified that Respondent was free to come and go; however, during his overnight stay Respondent left the duplex when the other occupants left and returned only when the other occupants returned (R.183-84, 195, 216-17). The only evidence concerning Respondent's right to allow or refuse entry to visitors was as follows:

> Q. [by defense attorney]: And if somebody came over to see Mr. Olson, did he have your permission to admit them or refuse to admit them?
>
> A. [by Louann Bergstrom]: I don't know. It was never discussed.
>
> Q. Had somebody come over to visit Mr. Olson, would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

(R.192).

The trial court denied Respondent's motion to suppress, finding that under these facts, Respondent had no reasonable expectation of privacy in the duplex and thus had no "standing" to contest his arrest. The court did not therefore reach the issue of whether exigent circumstances justified the warrantless arrest (Appendix C).

On February 11, 1988 Respondent was convicted as charged after a jury trial. Respondent appealed his conviction to the Minnesota Supreme Court, alleging numerous errors, including the legality of his warrantless arrest. Reaching only the issues of the legality of Respondent's warrantless arrest and his "standing" to raise the issue, the Minnesota Supreme Court reversed Respondent's conviction and remanded the case for a new trial on February 24, 1989 (Appendix A). The court held that as an overnight guest with permission to stay for an indefinite period and some authority to allow or refuse visitors entry, Respondent had a legitimate expectation of privacy in the duplex (Appendix A at A-7-9).[8]

The Minnesota Supreme Court then decided that the warrantless arrest was not justified by exigent circumstances because: a) Respondent was not the murderer but only his accomplice; b) the police had already recovered the murder weapon; c) Respondent had not yet left town; and d) the police should have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded (Appendix A at A-9-13).

[8] Respondent has consistently argued that he had the authority to admit or refuse others entry; the State has consistently argued that the record does not support such a conclusion. The trial court did not explicitly find lack of authority to control, but such a finding is implicit in the trial court's order. The Minnesota Supreme Court implicitly held that the trial court's finding on this issue was clearly erroneous.

Because the court held that the arrest violated Respondent's federal Fourth Amendment rights, it suppressed Respondent's post arrest statement. The court found that the use of the statement at trial was not harmless error and remanded the case for a new trial. The State filed a timely Petition for Rehearing on March 6, 1989 (Appendix D at A-27-36), which was summarily denied by the Minnesota Supreme Court on March 28, 1989 (Appendix B at A-15).

REASONS FOR GRANTING THE WRIT

I. IN HOLDING THAT RESPONDENT HAD "STANDING" TO CONTEST HIS WARRANTLESS ARREST, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT AND HAS THEREBY UNDULY BROADENED THE SCOPE OF THE FOURTH AMENDMENT.

The Minnesota Supreme Court held that, even though Respondent did not own or rent the duplex where he was arrested, had merely slept there on the floor one night, and had no possessions there except for a change of clothes, Respondent nevertheless had a reasonable expectation of privacy in the duplex because (1) he had permission to stay there for an indefinite period and (2) he had the right to allow or refuse visitors entry (Appendix A at A-7-9). The court relied on *Jones v. United States*, 362 U.S. 257 (1960) to support its holding, stating that "this case is quite similar to *Jones*" (Appendix A at A-8). In so holding, the Minnesota Supreme Court misapplied *Jones* and this court's subsequent Fourth Amendment "standing" cases, thereby greatly enlarging the class of

persons who may invoke the exclusionary rule for Fourth Amendment violations.

In *Jones v. United States*, 362 U.S. 257 (1960) this court held that anyone legitimately on the premises where a search occurs has standing to challenge the legality of the search. This court significantly narrowed the *Jones* holding, however, in *Rakas v. Illinois*, 439 U.S. 128 (1978):

> We think that Jones on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.

439 U.S. at 142. The court held that the correct inquiry was whether the challenger has a legitimate expectation of privacy in the area invaded. The court nevertheless affirmed the *Jones* result, holding that Jones did have a legitimate expectation of privacy in the apartment searched. Crucial to that decision was the fact that the owner of the apartment was away and that Jones had a key to the apartment. He could therefore come and go at will, and freely admit and exclude others: "Jones had complete domination and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149.

At first glance this case and *Jones* seem factually similar: Respondent and Jones were both overnight guests who carried with them only a change of clothes. There are, however, important factual differences between this case and *Jones* which the Minnesota Supreme Court overlooked: Respondent had far less control over his friend's home than did Jones. Respondent was never left alone in the duplex. The record indicates that he left the duplex when the other occupants of the dwelling left. He returned only when they returned. Respondent presented no evidence that he had the right to refuse entry to others, and the evidence with respect to admitting entry to others was qualified and vague (*See* R.192).[9] Nor did Respondent have a key to the duplex, a fact which, although not alone determinative, is extremely important to consider concerning whether he had control of the premises. When a host gives his guest a key to his house, he in effect says, "my home is your home," and in fact the guest can then come and go at will, exclude others, and completely control the premises, at least as long as the owner is absent. Because Respondent's control of the premises was minimal, a careful application of *Rakas* compels a finding that Respondent lacked a reasonable expectation of privacy in the duplex.

The Minnesota Supreme Court implicitly held that Respondent had a reasonable expectation of privacy in the entire premises. Several decisions of this court, however, suggest that the proper inquiry is whether he had a privacy interest not in the entire premises, but in the immediate area searched, i.e., the third floor attic closet in which he was found. *See United States v. Salvucci*, 448 U.S. 83, 95 (1980) (remanding to allow the defendants the opportunity to establish "that they had a legitimate expectation of privacy in the areas of [defendant's] mother's home where the goods were seized.");

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[9] The State contends that the Minnesota Supreme Court's conclusion regarding Respondent's right to admit or exclude others is clearly erroneous because it was not supported by the record. Furthermore, even if the record were subject to conflicting interpretations, the Minnesota Supreme Court apparently overlooked the fact that Respondent bears the burden of establishing that his personal Fourth Amendment rights have been violated. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *Rakas v. Illinois*, 439 U.S. at 130-131, n.1. It is the State's position that Respondent did not overcome his burden on this issue.

Rawlings v. Kentucky, 448 U.S. at 104 (Defendant must show he had a legitimate expectation of privacy in Cox's purse); *Rakas v. Illinois*, 439 U.S. at 148 (Defendants must show that they had "a legitimate expectation of privacy in the particular areas of the automobile searched"). Whatever expectation of privacy Respondent may have had in the areas he used during his overnight stay, Respondent made no showing that he had any privacy interest in the small third floor storage closet in which he was found and arrested.

The practical effect of the Minnesota Supreme Court's decision, finding a legitimate expectation of privacy under these facts, is to weaken the "standing" requirement to the point where it virtually disappears. Consistent with the Minnesota court's holding, a defendant may assert that his personal Fourth Amendment rights were violated by an arrest in any private home to which he has fled to escape police if he can simply show that he has permission to be in the home and he and his "host" have not agreed on a departure time. This is simply a restatement of the "legitimately on the premises" standard which this court rejected in *Rakas v. Illinois*.[10]

Moreover, the court's holding complicates the job of police officers in the field. The decision creates the type of problem anticipated eight years ago by Justice Rehnquist:

> The genuinely unfortunate aspect of today's ruling is not that fewer fugitives will be brought to book, or fewer criminals apprehended, though both of these consequences will undoubtedly occur; the greater misfortune is the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and permutations of this factual situation on a day-to-day basis. They will, in their various capacities, have to weigh the time during which a suspect for whom there is an outstanding arrest warrant has been in the building, whether the dwelling is the suspect's home, how long he has lived there, whether he is likely to leave immediately, and a number of related and equally imponderable questions.

Steagald v. United States, 451 U.S. 204, 231 (1981) (Rehnquist, dissenting).

[10] Nevertheless, the Minnesota Supreme Court's position that a defendant's status as an overnight guest is alone sufficient to confer a reasonable expectation of privacy in his host's home is also held by at least two federal circuit courts across the country. *See* Argument II, *infra*.

Such a broad view of the scope of the Fourth Amendment will greatly increase the invocation of the exclusionary rule. There is a "substantial social cost" of the rule: not only is "relevant and reliable evidence . . . kept from the trier of fact," resulting in some guilty persons going free, *Rakas v. Illinois*, 439 U.S. at 137, but widespread use of the rule also causes public outrage and distrust of the criminal justice system. If the police violated anyone's rights by entering the Bergstrom home, they violated the Bergstroms'. Broadening Fourth Amendment protection to persons like Respondent who have such a tenuous connection to a place is not worth that social cost.

II. IN HOLDING THAT RESPONDENT HAD "STANDING" TO CONTEST HIS WARRANTLESS ARREST, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE CONFLICTS IN PRINCIPLE BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS.

Since this court's decision in *Rakas v. Illinois*, numerous state and federal courts have addressed the scope of a defendant/guest's legitimate expectation of privacy in a third person's home. This is a critical and recurring issue in Fourth Amendment jurisprudence. Since the facts of each case are unique, however, no opinion appears to directly conflict with the Minnesota Supreme Court's decision. But conflicts in principle are numerous among the various state and federal courts considering the issue. Lower courts, while citing identical authority and language from this court, have reached inconsistent decisions which have left the law in this area in confusion. Review by this court is necessary to resolve these conflicts in principle and to clarify the law.

To determine whether guests in a third person's home possess a legitimate expectation of privacy in that home, lower courts have looked at several factors, including the guest's legitimate presence in the area searched; his possession or ownership of the area searched; his prior usage of the area; his ability to control the area by excluding others; and his subjective expectation of privacy. *See e.g. United States v. Carter*, 854 F.2d 1102 (8th Cir. 1988); *United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984); *United States v. Lochan*, 674 F.2d 960 (1st Cir. 1982); *United States v. Haydel*, 649

F.2d 1152 (5th Cir. 1981). Courts have considered such facts as whether the guest had a key, whether he had belongings at the place searched, or whether he was related to the owner of the premises. *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Haydel*, 649 F.2d at 1155. In weighing these factors, however, courts have reached inconsistent and sometimes incongruous results.

Courts are split on the very question presented by this case, the extent of control necessary to create a legitimate privacy interest. Some courts hold that the defendant's status as an overnight guest is alone sufficient to show that he had a privacy interest in a third person's home. *See United States v. McIntosh*, 857 F.2d 466 (8th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271 (9th Cir. 1986); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984). *See also State v. Elderts*, 62 Hawaii 495, 617 P.2d 89 (1980) (Since defendant was given permission by tenant to enter apartment, defendant had reasonable expectation of privacy there). Other courts hold that an overnight guest must also show a right to control access to the premises or possession of a key; the evidence required to show control, however, varies. *See United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988) (Defendant lacked privacy interest sufficient to object to search of apartment even though he had key because he offered no other evidence of right to control access or prior usage of apartment); *United States v. Gomez*, 770 F.2d 251 (1st Cir. 1985) (Defendant lacked "standing" to challenge search of apartment, even though he was the lessee, because he had been gone for four months, had allowed his brother to reside there in his absence, and made no showing

that he had the right to control premises); *United States v. Briones-Garza*, 680 F.2d 417 (5th Cir. 1982) (Even though defendant had lived at house for three weeks and could come and go at will, he lacked a sufficient privacy interest in house because he had no key, he could not control access to house and he shared house with fifty others); *United States v. Puliese*, 671 F.Supp. 1353 (S.D.Fla. 1987) (Defendant had no expectation of privacy where defendant was overnight guest who had no key and could not restrict access to home); *State v. Isom*, 196 Mont. 330, 641 P.2d 417 (1982) (Defendant's status as an overnight guest was not alone sufficient to confer "standing" to raise Fourth Amendment claim; defendant had "standing" because confiscated evidence was found near where defendant slept and defendant was alone in home and therefore had control over premises).

Courts also differ on the significance of *when* the defendant stayed overnight relative to the time of the search or seizure. *Compare United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984) (Defendant's expectation of privacy was limited, if it existed at all, because although defendant had key, could exclude others from home and had slept there on prior occasions, he had not stayed at house the night before the search) *with United States v. Small*, 664 F.Supp. 1357 (N.D.Cal. 1987) (Defendant had reasonable expectation of privacy in three separate residences simultaneously since he had been frequent guest at all of them).

Another question subject to inconsistent treatment is whether the privacy interest in the "area searched" includes the entire premises or is limited to the immediate area from which the seized property was taken. *Compare United States v. Nabors*, 761 F.2d 465 (8th Cir. 1985), *cert. denied*, 474 U.S. 851 (1985) *reh. denied*, 474 U.S. 1077 (1986) and *United States*

v. Small, 664 F.Supp. 1357 (N.D.Cal. 1987) (Court analyzed whether defendant had reasonable expectation of privacy in entire house, rather than in specific areas where contraband was found) *with United States v. Meyer*, 656 F.2d 979 (5th Cir. 1981), *cert. denied*, 464 U.S. 1001 (1983) (Court analyzed whether defendant had privacy interest in particular area searched, the bathroom cabinet). Courts also disagree on the assignment of the burden of proof on this question. *Compare United States v. Rackley*, 742 F.2d 1266 (11th Cir. 1984) (Defendant's expectation of privacy was limited to guest bedroom where he slept even though defendant had key to house because he did not show he had access to other portions of house that were searched) *with United States v. Perez*, 700 F.2d 1232 (8th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984) (Defendants as overnight guests had legitimate expectations of privacy in entire home because no evidence was produced that defendants were restricted from using any room in house).

The disparity in the way lower courts have applied this court's rulings on the scope of the Fourth Amendment's legitimate expectation of privacy has left the law in confusion. This court's review of the Minnesota Supreme Court's decision is necessary to clarify this important issue of federal constitutional law.

III. IN HOLDING THAT EXIGENT CIRCUMSTANCES DID NOT JUSTIFY RESPONDENT'S WARRANTLESS ARREST BECAUSE POLICE COULD HAVE MAINTAINED A STAKEOUT OF THE PREMISES WHILE OBTAINING A WARRANT, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

This case presents the question of whether, and under what circumstances, police are required to delay entry to arrest and instead stake out a residence while obtaining a warrant. This question, part of the broader issue of how to define the exigent circumstances necessary to justify a warrantless police entry of a dwelling to make an arrest, has not yet been decided by this court.

The Minnesota Supreme Court held that Respondent's warrantless arrest was not justified by exigent circumstances because: 1) Respondent was not the murderer but only his accomplice; 2) the police had already recovered the murder weapon; 3) Respondent had not yet left town; and 4) the police could have obtained a warrant, either during the hour while they waited for Respondent's return to the duplex or while they had the house surrounded. The Minnesota Supreme Court specifically held that exigent circumstances did not exist for Respondent's warrantless arrest because officers could have continued to stake out the house while trying to obtain a warrant (Appendix A at A-11-12). The Minnesota Court's decision needs to be reviewed by this court because: a)

the court's holding is wrong as a matter of public policy; b) the court's decision conflicts with several federal and state appellate court cases; c) appellate courts across the country are divided on the issue; and d) the court's decision is based on faulty reasoning.

Decision is Contrary to Public Policy

The court's holding that exigent circumstances did not exist for the warrantless arrest because officers could continue to stake out the house while trying to obtain a warrant is contrary to public safety and common sense. The court's assertion ignores the reality that to maintain surveillance of the "hideout" of a felon connected with an armed robbery and murder is extremely dangerous to the police, to the defendant, to the other occupants of the house, and to the public at large. Had the police maintained a stakeout at the duplex for the several hours required to obtain a murder complaint (or even a search warrant), Respondent, who knew he was involved in a robbery/murder, and that police were outside, may well have become desperate to escape. The stakeout would give him time to explore his options, including an armed shootout with the police or the taking of a hostage from within. A desperate Respondent may well have turned on his acquaintances, deciding perhaps that one of the Bergstroms must have reported his whereabouts to police. Meanwhile, the presence of numerous squad cars in a populated area not only disrupts local activities, but may well draw curious bystanders to the area where they could be harmed by the defendant's likely resistance to arrest. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others" *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). The Minne-

sota Supreme Court's encouragement of stakeouts is not required by the Fourth Amendment and will have the effect of transforming the country's peaceful neighborhoods into armed camps whenever a felon chooses to hide out there.

Not only does the holding make the policeman's job more dangerous, but it also makes it more difficult:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. As Mr. Justice Powell noted, concurring in *United States v. Watson, supra,* police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.
>
> Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a

> warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

Payton v. New York, 445 U.S. at 618-619 (White, dissenting).

Decision Conflicts with other Courts

Not surprisingly, several courts disagree with the Minnesota Supreme Court's encouragement of a stakeout under similar facts: *See United States v. Salvador,* 740 F.2d 752 (9th Cir. 1984), *cert. denied,* 469 U.S. 1196 (1985); *United States v. Webster,* 750 F.2d 307 (5th Cir. 1984); *United States v. Williams,* 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied,* 445 U.S. 934 (1980) ("[A]n immediate response by entry was necessary to prevent the occurrence of contingencies which would have made appellant's capture alive and without harm to the police or others impossible, or at least, unlikely; i.e., that appellant would barricade himself in the residence and engage in a shootout or attempt an armed escape with or without hostages".); *United States v. Campbell,* 581 F.2d 22 (2nd Cir. 1978); *United States v. Brightwell,* 563 F.2d 569 (3rd Cir. 1977), *cert. denied,* 439 U.S. 849 (1978); *United States v. McLaughlin,* 525 F.2d 517, 521 (9th Cir. 1975), *cert. denied,* 427 U.S. 904 (1976) ("The officers . . . could take their chances with respect to the destruction of the evidence, obtain reinforcements, and settle in for several hours of siege while awaiting the arrival of the warrant, or move quickly to arrest the occupants and to secure the premises and the evidence while awaiting the arrival of the warrant. We cannot accept the view that the Fourth Amendment requires that the officers pursue the former course. To do so would ignore the legitimate interests of the neighbors whose surroundings should not be impressed with a stage of siege, innocent per-

sons who might be injured accidently as a consequence of a large number of armed and mobile men, and the interest of the general public in efficient law enforcement and certain punishment for wrongdoers."); *United States v. Shye*, 492 F.2d 886, 892 (6th Cir. 1974) ("Although there was little likelihood of escape, due to the presence of so many officers, there was, nevertheless, a substantial likelihood of bloodshed or an impeding siege if quick action were not taken."); *State v. Girard*, 276 Or. 511, 515, 555 P.2d 445, 447 (1976) ("Defendant argued that the two officers could have 'surrounded' the house to avoid escape while they waited for reinforcements. That involves a large measure of speculation, depending upon a variety of factors relating to the feasibility of 'surrounding' the house or otherwise preventing escape, including the size of the house, the number of exits, the proximity of the house to cover for a person bent on escape, visibility, etc. In the exigencies of the moment, the officers could not reasonably be expected to put fine weights in the scale in weighing the chances of securing the house or of losing their quarry.").

Country is Split on Issue

Not all courts would disagree, however, with the Minnesota Supreme Court's holding; the country is divided on the issue. *Compare e.g. United States v. Patino*, 830 F.2d 1413 (7th Cir. 1987) (requiring a stakeout of armed robbery suspect's apartment pending procurement of a warrant) *with United States v. Campbell*, 581 F.2d 22 (2nd Cir. 1978) (a stakeout of armed robbery suspect's apartment not required). *See also United States v. Alvarez*, 810 F.2d 879 (9th Cir. 1987); *United States v. Adams*, 621 F.2d 41 (1st Cir. 1980); *People v. Atkinson*, 116 Misc.2d 771, 456 N.Y.2d 328 (1982); and

State v. Peller, 287 Or. 255, 598 P.2d 684 (1979) (Courts decide warrantless entry was not justified by exigent circumstances under facts of case; courts suggest that police should have staked out the premises until a warrant could be obtained).

Decision has Faulty Basis

Because the Minnesota Supreme Court overlooked or misconceived several important facts, its decision was the result of faulty reasoning. The court failed to properly consider that the crime was a violent robbery and murder; that it was committed with a firearm; that police had reason to believe that Respondent might still possess a firearm; that Respondent had previously fled police; and that both the tip and Respondent's own statement over the telephone indicated that he intended to flee. The court also overlooked the fact that it takes much longer to obtain an arrest warrant (i.e., a murder complaint) than a search warrant. (*See* State's Petition for Rehearing, Appendix D at A-31-34).

The court also erred in concluding that the arrest of Respondent was "planned" and that any exigency was destroyed by the 45 minute delay between the establishment of probable cause and the arrest. Respondent's arrest was actually the culmination of an ongoing, continuous investigation into the identity and present location of Ecker's co-defendant. Moreover, the Minnesota Supreme Court ignored the fact that an exigency requiring police action may arise at any time after probable cause is established. *See Cardwell v. Lewis*, 417 U.S. 583, 595-96 (1974) ("Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a

warrant was not obtained at the first practicable moment . . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.") In this case, even if exigent circumstances did not exist before police surrounded the duplex, the necessity for quick police action arose after the telephone call into the duplex. When the police heard a male, presumably Respondent, instruct "Julie" to "tell them I left," police could reasonably have decided that Respondent intended to flee; under the facts of this case, police were then justified in entering immediately to prevent Respondent's escape.[11]

Because the Minnesota Supreme Court's decision is wrong as a matter of public policy; because the nation is divided on the question of exigent circumstances presented by this case; and because the Minnesota Supreme Court's holding conflicts, at least in principle, with decisions of numerous federal and state appellate courts; review of the Minnesota Supreme Court's decision by this court is necessary to clarify this important, but as yet unresolved, question of federal constitutional law.

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[11] The Minnesota Court's characterization of the arrest as "planned" and its failure to recognize that an exigency can arise at some point after probable cause is established, conflicts, at least in principle, with the opinions of several state and federal appellate courts. *See e.g. United States v. Cattouse*, 846 F.2d 144 (2nd Cir. 1988); *United States v. Santiago*, 828 F.2d 866 (1st Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1244 (1988); *United States v. Standridge*, 810 F.2d 1034 (11th Cir. 1987), *cert. denied*, 481 U.S. 1072 (1987); *United States v. Picariello*, 568 F.2d 222 (1st Cir. 1978); *People v. Abney*, 81 Ill.2d 159, 407 N.E.2d 543 (1980).

CONCLUSION

For the reasons discussed above, the State of Minnesota respectfully requests that the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court be granted.

Respectfully submitted,

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May 24, 1989

APPENDIX

APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C3-88-687

Hennepin County — Simonett, J.
Took no part, Keith, J.

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

Filed February 24, 1989
Office of Appellate Courts

SYLLABUS

Warrantless entry of defendant's dwelling, in absence of exigent circumstances, requires suppression of defendant's statement and, hence, a new trial.

Reversed and remanded for a new trial.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

Defendant Robert Olson appeals his conviction for first degree murder, three counts of armed robbery, and three counts of second degree assault. He claims, among other

things, that his arrest was illegal, lacking probable cause and accomplished by a warrantless entry of the place where he was staying. We conclude Robert Olson's constitutional rights were violated by the warrantless entry requiring suppression of tainted evidence, and reverse for a new trial.

On Saturday morning, July 18, 1987, shortly before 6 a.m., a lone gunman robbed an Amoco station in Minneapolis, shooting to death the station manager. The police were quickly alerted and, from the description of the robbery, suspected Joseph Ecker. Two officers drove to Ecker's home, arriving at about the same time as a brown Oldsmobile pulled up. The Oldsmobile tried to escape, spun out of control, and came to a stop. Two white males got out of the car and fled on foot. In short order one of the two men, who proved to be Joseph Ecker and who was identified as the robber-gunman, was captured inside his home. The other man, unidentified but described as tall, thin, a white male in his early twenties with sandy brown hair, escaped. It was now about 6:15 a.m.

Inside the abandoned Oldsmobile police found a sack of money and the weapon soon thereafter identified as the murder weapon. Also in the car was a title certificate showing the Oldsmobile's owner to be Keith Jacobson. The name Rob Olson appeared on the certificate as a secured party but with the name crossed out; the bottom half of the certificate, used to transfer title, was missing. There was also a letter in the car, dated May 11, 1987, from an insurance company addressed to *Roger R.* Olson, 3151 Johnson Street. A second search of the car pursuant to a search warrant revealed a videotape rental receipt dated July 16, 1987 (2 days earlier), issued to Rob Olson. The police verified that a Robert Olson lived at 3151 Johnson Street. The police talked to Ecker and a woman who had been in the house when Ecker was arrested. Neither

identified Robert Olson as having been in the getaway Oldsmobile or connected with the robbery. The woman gave the names of persons who had been with Ecker the night before; Olson's name was not among them. The police were unable to locate Keith Jacobson.

The next day was Sunday, July 19. In the morning a woman called the police and said a man by the name of Rob was the driver of the getaway car and was planning to leave town by bus. The caller gave her name as Dianna Murphy. About noon the woman called again, said she was Dianna Murphy, and gave her address and phone number. She said that a woman named Maria lived on Garfield Northeast and gave Maria's phone number. Maria, she said, had told her that a man named Rob had admitted to Maria and to two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller said Louanne was Julie's mother and the two women lived at 2406 Fillmore Northeast.

The detective-in-charge who took the second telephone call did not attempt to verify the identity of the caller. If he had, he would have learned no one by the name of Dianna Murphy lived at the address and phone number given. Neither was Maria contacted. The detective did, however, send police officers to 2406 Fillmore to check out Louanne and Julie. The Fillmore address proved to be a duplex. Louanne Bergstrom and her daughter Julie resided in the upper unit but were not home. Louanne's mother (Julie's grandmother) lived in the lower unit. She confirmed that a Rob Olson had been staying upstairs and promised to call the police when Olson returned. The grandmother was not aware of Olson's involvement in any robbery. A pickup order was then issued for Olson's arrest.

About 2:45 p.m., the grandmother called police and said Olson had returned. The detective then instructed police offi-

cers to surround the house. No effort was made to obtain an arrest warrant. The detective later explained in court that he had never attempted to get an arrest warrant on a weekend during his 20 years on the force. After the house was surrounded, the detective phoned Julie and told her Rob should come out of the house. The detective heard a male voice say "tell them I left." Julie then said that Rob had left, whereupon the detective ordered the police to enter the house. They did so with drawn weapons and without seeking permission. Defendant Olson, age 19, was found hiding in a closet.

After his arrest, defendant admitted to the police that he had driven Joseph Ecker from Ecker's house to an apartment building on Second Avenue Southeast near the Amoco station on University Avenue. Olson said Ecker had asked for a ride to pick up a girlfriend; that on the way he stopped at the Amoco station to buy cigarettes and pop; and that he then parked by the apartment building about a block from the station. He said Ecker was gone about 10 minutes and returned with a gun and a bag and ordered Olson to drive him home. Olson said he fled from the police at the Ecker house because he was scared of Ecker. Subsequent investigation disclosed that Olson had bought the Oldsmobile from Keith Jacobson but title had not yet been transferred. Defendant's defense at trial was that he had been duped into driving Ecker to the scene of the robbery.

The two main issues on appeal concern the legality of defendant's arrest. Was there probable cause? Did circumstances justify a warrantless, nonconsensual entry of the duplex? Defendant argues both these questions must be answered no, and, therefore, evidence obtained from his arrest—most importantly, his statement to the police—should have been suppressed.

I.

When police have arrested a suspect without a warrant, the test is whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978). A determination of whether the police had probable cause to arrest is a determination of constitutional rights, and this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *See Ker v. California*, 374 U.S. 23, 34 (1963).

At the time of defendant's arrest the police knew that a robbery-homicide had occurred. They had arrested one suspect, Joseph Ecker, and had a description of the unknown driver. In the getaway car was a certificate of title listing Keith Jacobson as the car's owner. The name Rob Olson was on the title certificate but as a secured party and the name was crossed out. A receipt for a videotape rental, dated 2 days earlier, was also in the car, issued to Robert Olson.

The trial court found that this physical evidence alone, without the informant's tip, was sufficient to establish probable cause. We have our doubts. As defendant points out, this evidence only suggested Olson might have had some property or lien interest in the getaway car and that he may have ridden in the car 2 days before the robbery. Keith Jacobson would seem to have been a more likely suspect. Significantly, although the police had this physical evidence on Saturday, they did not issue a pick-up order for Olson until Sunday, after receiving the telephone tip from "Dianna Murphy."

Consequently, the question becomes whether the tip was reliable and if it together with the physical evidence establishes

probable cause. In evaluating an informant's tip, the court looks at the commonsense totality of the circumstances, including the informant's veracity, reliability, and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In this case, the police knew nothing about the informant's identity or reliability. If the police had called the number "Dianna Murphy" gave them or checked her name in the telephone directory, they would have found there was no such person. The caller did not claim any personal knowledge of the information related, simply passing on what she had apparently been told by Maria, another unidentified source. On the other hand, the police did verify that at least part of the information given was correct, namely, that two women named Louanne and Julie lived at the address given and that a Rob Olson was staying there. The police also knew that the getaway car was connected in some way with a man named Rob Olson, which lent credence to the informant's statement that Rob Olson was the driver of the getaway car.

"[T]he fact that police can corroborate part of the informant's tip as truthful may suggest that the entire tip is reliable." *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). In *Siegfried*, however, the informant was known to the police as a reliable private citizen and had obtained the reported information by personal observation; further, the information had been accepted by a magistrate in granting an application for a search warrant. *See also State v. Wiley*, 366 N.W.2d 265 (Minn. 1985) (corroboration on a non-key item and informant had history of past reliability). The trial court here relied on *State v. Causey*, 257 N.W.2d 288 (Minn. 1977); but in *Causey* a magistrate had found probable cause for issuing a search warrant based on information supplied by a known reliable informant who accompanied the officer to the defendant's residence, where a car registered to a convicted drug possessor was parked. *Cf. State v. Elling*, 355 N.W.2d 286 (Minn. 1984) (police made extensive efforts verifying informant's identity and source of information). Nevertheless, there is force to the state's argument in this case that "Dianna Murphy's" tip was sufficiently corroborated so that, together with other known information, there was probable cause.

A review of our cases reveals, what should come as no surprise, that the "totality of the circumstances" test is fact-specific. In this case we conclude we need not resolve the probable cause issue because the issue of warrantless entry, which we next discuss, proves to be dispositive.

II.

Defendant claims the warrantless entry of the duplex at 2406 Fillmore to seize him was a violation of his fourth amendment rights. The state counters that defendant lacks standing to make this challenge; but, even if standing exists, exigent circumstances justified the warrantless entry of the duplex. We conclude defendant's constitutional rights were violated.

It is unclear why an arrest warrant was not obtained in this case, particularly since we have encouraged law enforcement officers to obtain a warrant whenever possible. *See Merrill*, 274 N.W.2d at 108. The previous day, Saturday, the police had no difficulty in obtaining a search warrant for the car in 2½ hours. Here, however, apparently no attempt was made to obtain an arrest warrant because it was Sunday, surely a curious reason for not observing the constitutional safeguards of citizens.

A

For defendant Olson to challenge the warrantless entry and seizure of his person at Louanne's house, he must show

a legitimate expectation of privacy in the upper duplex at 2406 Fillmore. *See State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). For some days prior to the robbery, Olson had been living with Ecker at 2420 Polk. On Friday night he did not return to Ecker's house until 4:30 a.m., having been out on a date. On Saturday night Olson did not return to Ecker's house, nor to his own, because he was afraid of being arrested; instead he stayed that night at Louanne Bergstrom's duplex. The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that Louanne Bergstrom testified Olson had the right to allow or refuse visitors entry. While the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search, *Rakas v. Illinois*, 439 U.S. 128, 142 (1978), this does not mean that a guest never has standing. *See also United States v. Salvucci*, 488 U.S. 83 (1980) (overruling the holding in *Jones v. United States*, 362 U.S. 257 (1960) that possession of a seized good creates standing). Indeed, this case is quite similar to *Jones*, where an expectation of privacy was found. Jones had permission to stay at a friend's apartment; he had a key; he had a change of clothes; his home was elsewhere; and he had slept at the friend's apartment for "maybe a night." *Id.* at 259. Although the *Rakas* court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case. *Rakas*, 439 U.S. at 142-43. *See also Steagald v. United States*, 451 U.S. 204, 230-31 (1981) (Rehnquist, J., dissenting).

The trial court thought it significant that Olson was trying to evade the police so that his presence at 2406 Fillmore was "wrongful." Not so. A reasonable expectation of privacy is not forfeited (nor to be emasculated) because of the defendant's motives for seeking privacy. As LaFave explains, "to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 4 W. LaFave, *Search and Seizure* § 11.3(b) at 299 (2d ed. 1987).

Finally, the state argues that defendant had no *actual* expectation of privacy. In *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the United States Supreme Court said that to challenge an illegal search a defendant must have an actual expectation of privacy as well as one that society is prepared to recognize as reasonable. The trial court thought that defendant's statement to Julie, "tell them I've left," indicated that defendant had no actual expectation of privacy at 2406 Fillmore. We think not. This statement more likely suggests that defendant was simply attempting to discourage the police from invading his privacy by giving them a further reason, albeit of doubtful plausibility, not to enter the house.

We hold that defendant has standing to challenge the legality of his arrest.

B.

The right to be secure in the place which is one's home, to be protected from warrantless, nonconsensual intrusion into the privacy of one's dwelling, is an important fourth amendment right. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). To justify a warrantless arrest in a defendant's home, the state must show urgent need, *i.e.*, the presence of exigent circumstances. We make our own evaluation of the found facts

(which in this case are not in dispute) in concluding whether exigent circumstances exist. *Storvick*, 428 N.W.2d at 58 n. 1. In making this determination, we have used the so-called *Dorman* analysis, with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984).[1] Thus, a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh*, 466 U.S. 740, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. *Lohnes*, 344 N.W.2d 605; *State v. Hatcher*, 322 N.W.2d 210 (Minn. 1982).

In this case the state claims exigent circumstances for a warrantless arrest in Louanne's duplex because defendant was a suspect in a murder, guns had been found in the getaway car, defendant had fled the police once, and there was information that he might try to flee again.

While it is true a grave crime was involved, it is also true that the suspect was known not to be the murderer but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of the unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had

[1] The *Dorman* analysis considers: (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reason to believe that the suspect is in the premise being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).

stayed the previous night. The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday.

We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended. This case is unlike *Lohnes*, for example, where the suspect was believed to have committed the crime of violence, probable cause was strong, and the weapon had not been found. In *Lohnes*, too, the dwelling was in an isolated rural area, distant from a magistrate, the time 5 a.m., and it was doubtful if sufficient police resources were on hand to contain the suspect until an arrest warrant could be obtained. *Lohnes*, 344 N.W.2d at 611-12.

Cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time to obtain an arrest warrant. *See* 2 W. LaFave, *Search and Seizure* § 6.1(f), at 605-08 (2d ed. 1987). Again, the differing circumstances can explain the differing results. Sometimes a stake-out will adequately freeze the situation, while on other occasions the ensuing delay may increase the chances of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest in medias res, which occurs in the field as part of unfolding developments. *Id.* Thus, in *Lohnes*, we pointed out that the arrest was the culmination of a rapidly developing situation in the field, with only 35 minutes elapsing from the time the sheriff attempted to locate the suspect to the warrantless arrest of the suspect at his home. *Lohnes*, 344 N.W.2d at 611. *See also Welsh*, 466 U.S. at 761 (White, J., dissenting) ("The decision to arrest without a warrant typically is made in the field

under less-than-optimal circumstances * * *."). Where, however, the arrest is planned in advance, it is less likely the police can claim exigent circumstances.

Shortly after 1 p.m. on Sunday the detective in charge talked with Julie's grandmother on the telephone and learned that a Rob Olson "had been staying upstairs for a day or two with Louanne and Julie," and he obtained the grandmother's promise to call if Rob returned to the house. At 2 p.m. the detective issued a pick-up order for Olson, what he called a "probable cause arrest bulletin." The police were instructed to stay away from the duplex. At 2:45 p.m. the grandmother called the detective again to report Rob had returned. Squad cars were sent to the duplex and, at 3 p.m., the detective (coordinating the arrest efforts from headquarters by radio and telephone) ordered entry of the duplex. Olson was brought to headquarters within an hour. By then the detective who had been in charge was gone. He went off duty at 3 p.m. At least by 2 p.m., then, the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour, or within a relatively short time thereafter; on the other hand, the state has not suggested the warrant could not have been obtained. We do know a search warrant was obtained on Saturday, the day before, in 2 1/2 hours when the urgency to search an already impounded car was much less.

A warrantless, nonconsensual intrusion of one's dwelling is not to be lightly regarded; indeed, such an entry is considered presumptively unreasonable, and the United States Supreme Court has stressed the state bears a "heavy burden"

to establish exigent circumstances. *Welsh*, 466 U.S. at 749. In this particular case, considering all the circumstances, we do not think that burden has been met. We hold defendant's fourth amendment rights were violated.

C.

Defendant asks that all evidence obtained from the illegal arrest be suppressed. This includes Olson's statement, the statements of all persons present at 2406 Fillmore at the time of his arrest, and Joseph Ecker's statement which was obtained after the police showed him Olson's statement. Evidence obtained as a result of an illegal arrest must be suppressed unless it is obtained by means sufficiently distinguishable from the illegal exploitation to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Here Olson was taken immediately to police headquarters, and the police obtained a statement from him within an hour of his illegal arrest. We believe the statement was tainted and must be suppressed.

While the state has not argued that Olson's statement was untainted, it does argue that admission of Olson's statement at trial was harmless beyond a reasonable doubt. *See State v. Forcier*, 420 N.W.2d 884, 886-87 (Minn. 1988). There was other evidence, says the state, to establish that Olson was the driver of the getaway car, and Olson's statement had no significant impact on the guilty verdicts. At trial, however, the state relied heavily on various details in Olson's statement to point out discrepancies in his story; these discrepancies were then used to argue that Olson was lying about being duped by Ecker. For example, in his statement Olson said he was in the Amoco station about 10 minutes before the robbery to buy cigarettes and pop but the surveillance videotape showed no customer in the store at that time. In final argument, the

prosecutor told the jury, "Now the proof of the pudding here, ladies and gentlemen, is in this statement"; and the prosecutor then went on, point by point, to show where Olson's statement did not appear to square with other facts. Olson's credibility was a key issue at trial and use of his statement obtained as a result of the illegal arrest was not harmless error.

We reverse and remand for a new trial. As we have mentioned, defendant claims there is other evidence which should also be suppressed along with his statement. He supports his claim only by assertion, and the record before us is unenlightening. The trial court on remand will be in a better position to deal with these claims. We need not reach other issues raised by defendant in this appeal.

Reversed and remanded for a new trial.

KEITH, Justice, took no part in the consideration or decision of this case.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

C3-88-687

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

ORDER

This court, having considered en banc the petition for rehearing in the above entitled cause,

IT IS ORDERED that the petition for rehearing be and hereby is denied and stay vacated.

Dated: March 28, 1989

By the Court:
JOHN E. SIMONETT
Associate Justice

KEITH, Justice, took no part in the consideration or decision of this case.

APPENDIX C

State of Minnesota — District Court
County of Hennepin — Fourth Judicial District

File No. 94726-2

STATE OF MINNESOTA,

Plaintiff,

v.

ROBERT D. OLSON,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

The above-entitled matter came duly on for *Rasmussen* hearing before the undersigned Judge of District Court on December 15th and 16th, 1987.

Mr. Gary S. McGlennen, Assistant Hennepin County Attorney, appeared on behalf of the state.

Mr. Glenn P. Bruder, Esq., appeared on behalf of the defendant, who was also present.

The Court, having considered all files, records and proceedings herein, together with the memorandae and arguments of counsel, now makes the following:

FINDINGS OF FACT

1. That on July 18, 1987 a lone gunman entered the Amoco Station at 1000 University Avenue in Minneapolis.

2. That the gunman committed an armed robbery during the course of which the station manager, Roger Reinhart, was fatally shot.

3. That the gunman then fled the service station.

4. That Minneapolis Police Officers Scott Grabowski and Duane Pihl heard a police dispatcher report the robbery, shooting and suspect's appearance.

5. That Officer Pihl believed, because of a police report he had received, that this suspect might be one Joseph Ecker, who resided at 2420 Polk Avenue Northeast.

6. That the officers proceeded to that location where they observed a brown Oldsmobile proceeding northbound in the alley between 24th Street and Lowry Avenue.

7. That the officers exited their squad car and drew their weapons and began approaching the vehicle.

8. That the vehicle began backing rapidly away from the officers northbound down the alley towards Lowry Avenue.

9. That the officers re-entered their squad car and began to pursue the vehicle.

10. That the driver of the vehicle lost control of the vehicle as he turned onto Lowry Avenue and the car stopped.

11. That two individuals exited the vehicle and fled the area on foot.

12. That other Minneapolis Police Officers arrived on the scene and the house at 2420 Polk was searched; Joseph Ecker was taken into custody and subsequently identified as the gunman who had entered the Amoco Station.

13. That a search of the vehicle turned up a certificate of Title on which Robert Olson's name appears, a letter address to Roger Olson, and a video movie rental receipt made out to Robert Olson and dated July 16, 1987.

14. That on Sunday, July 18, 1987, Sergeant James DeConcini was on duty in the Homicide Division of the Minneapolis Police Department.

15. That Sergeant DeConcini knew that there had been a robbery-homicide at the Southeast Amoco the day before;

knew that the brown Oldsmobile had been linked to this robbery-homicide; knew that one occupant of the Oldsmobile, a caucasian male, was still at large; and knew that physical evidence found in the Oldsmobile linked the vehicle to one Robert Olson.

16. That on Sunday morning, Sergeant DeConcini learned from Sergeant Robert Nelson that a "Diana Murphey" had called and stated that a "Rob" was the driver of the car involved in the robbery-homicide and that "Rob" was planning to leave town by bus soon.

17. That later that same day, a caller identifying herself once again as "Diana Murphy" telephoned Sergeant DeConcini and stated that "Rob" had told three people that he was the driver of the brown Oldsmobile used in the robbery-homicide and that two of the people he had told this to were "Julie" and "LouAnne" of 2406 Fillmore Northeast.

18. That Sergeant DeConcini sent Minneapolis Police Officers to 2406 Fillmore Northeast to verify this information.

19. That when the officers arrived at 2406 Fillmore they learned that the dwelling was a duplex and that Julie and LouAnne Bergstrom resided in the upper apartment.

20. That the officers talked to the resident of the lower apartment, Helen Niederhoffer, who told them that Rob Olson was staying upstairs but was not there at that time; Ms. Niederhoffer stated she would call the police when Robert Olson returned.

21. That Sergeant DeConcini issued a pick-up order for Robert Olson at approximately 2:00 p.m.

22. That at approximately 2:30 p.m. Helen Niederhoffer called Sergeant DeConcini and stated that Robert Olson had returned to the upstairs apartment at 2406 Fillmore.

23. That Sergeant DeConcini then dispatched officers to 2406 Fillmore.

24. That when the officers had taken up positions outside the residence, Sergeant DeConcini telephoned the residence and spoke with Julie Bergstrom; Sergeant DeConcini told Julie Bergstrom that he wanted Robert Olson to go outside and Sergeant DeConcini heard a male voice say, "Tell them I left."; Julie Bergstrom then stated, "Rob left already."

25. That Sergeant DeConcini related this information to the officers stationed outside the residence.

26. That the officers then entered the residence at 2406 Fillmore and arrested Robert Olson.

27. That at the Rasmussen hearing Dianna Joe Humphrey testified that she resided at the address given by the caller to Sergeant DeConcini and that her phone number matched the number given by the caller to the sergeant, but that she never made any calls to anyone regarding Robert Olson.

28. That Robert Olson testified that he had stayed at 2406 Fillmore for one night, had no bed there and had slept on the floor, had no closet, dresser, toothbrush, and only one bag of clothes, and was reluctant to return to 2420 Polk, where he had been living previously, because he knew that the police had arrested Joseph Ecker there and had searched that premises.

CONCLUSIONS OF LAW

1. The warrantless arrest of the defendant at 2406 Fillmore Northeast was not violative of his Fourth Amendment rights.

2. Defendant had no reasonable expectation of privacy in the residence at 2406 Fillmore Northeast.

3. Probable cause existed to arrest the defendant without a warrant at 2406 Fillmore Northeast.

4. There being no violation of the defendant's Fourth Amendment rights, there are no grounds for excluding and suppressing any evidence derived, directly or indirectly, from the defendant's arrest at 2406 Fillmore.

ORDER

1. Defendant's motion to exclude and suppress any and all evidence, directly or indirectly derived from his arrest at 2406 Fillmore is hereby denied in all respects.

2. The attached memorandum is hereby incorporated by reference.

Dated: January 29, 1988.

By The Court:
JAMES H. JOHNSTON
Judge of District Court

MEMORANDUM

THE WARRANTLESS ARREST OF THE DEFENDANT WAS NOT VIOLATIVE OF HIS FOURTH AMENDMENT RIGHTS. ANY AND ALL EVIDENCE DERIVED DIRECTLY OR INDIRECTLY FROM THIS ARREST WILL THEREFORE NOT BE EXCLUDED OR SUPPRESSED.

I. Defendant had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Northeast.

In order to successfully move to suppress evidence, the defendant must have had a reasonable expectation of privacy in the area searched. See, *State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). If the defendant had no such expectation of privacy, then he lacks the requisite standing to challenge the constitutionality of the police conduct. If the defendant did in fact have a reasonable expectation of privacy, the Court will then inquire whether the defendant exhibited an actual expectation of privacy (see *United States v. Chadwick*, 433 U.S.

1 (1977) and whether his expectation is one that society recognizes as reasonable, (see *Smith v. Maryland*, 442 U.S. 735 (1979)).

In the present case, the Court finds that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore and therefore lacks standing to challenge the evidence derived from his arrest at that location. Furthermore, the Court finds that, even if defendant did have a legitimate expectation of privacy at 2406 Fillmore for purposes of standing, the defendant did not exhibit any actual expectation of privacy in that dwelling and also that any expectation of privacy the defendant had was unreasonable.

The Court finds that the defendant had no legitimate expectation of privacy for the following reasons. Defendant's abode for a number of weeks before July 19, 1987 was 2420 Polk, not 2406 Fillmore. Defendant was reluctant to return to 2420 Polk because he knew that Joseph Ecker had been arrested there in connection with the robbery-homicide at the Southeast Amoco and also that the police had searched the dwelling on Polk. The defendant had been linked to this robbery-homicide by evidence found in the vehicle used to flee the scene and by tips from an informant. Defendant was not the owner of the property at 2406 Fillmore. He was not a tenant at the house. Defendant had spent only one night there when he was arrested. He had no dresser or closet and only one bag of clothes with him. He had no bed but instead slept on the floor. He did not have a toothbrush at 2406 Fillmore. Based on these facts, the Court finds that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore and therefore lacks standing to challenge any and all evidence against him procured as a result of his arrest at that location.

Furthermore, the Court finds defendant's statement to Julie Bergstrom (telling her to tell the police that he had left the premises) shows that defendant did not exhibit any expectation of privacy in the dwelling at 2406 Fillmore. The Court also finds that since the defendant had been connected with a robbery-homicide and was reluctant to return to his usual abode on Polk, the defendant was not an invited guest at 2406 Fillmore but rather a fugitive from a criminal investigation. The Court therefore finds that any expectation of privacy the defendant may have had was unreasonable.

In conclusion, the Court finds that the defendant had no legitimate expectation of privacy in the premises at 2406 Fillmore. Defendant therefore lacks standing to challenge the evidence procured against him as a result of his arrest at that location. Defendant did not exhibit any actual expectation of privacy in that dwelling and any expectation of privacy the defendant may have had, for purposes of argument, was unreasonable.

II. The police had probable cause to arrest the defendant at 2406 Fillmore without an arrest warrant.

Probable cause is defined as:

> A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

State v. Olson, 342 N.W.2d 638, 640 (Minn.Ct.App.); *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978). Where the police have arrested a suspect without a warrant the test is whether the officer in the particular circumstances, conditioned by his own observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99 (Minn. 1980). Although the Fourth

Amendment prohibits the police from making a warrantless entry into the suspect's home to make an arrest, absent consent or hot pursuit, the defendant in this case was not in his own home and, as has already been discussed, had no legitimate expectation of privacy in the dwelling where he was arrested. The issue is whether Sergeant DeConcini had probable cause to order the arrest of the defendant at 2406 Fillmore on July 19, 1987. For the following reasons, the Court finds that probable cause did exist to arrest the defendant.

At the time of the defendant's arrest, Sergeant DeConcini knew that a robbery-homicide had occurred at the Southeast Amoco. He also knew that two pieces of physical evidence, a certificate of title and a movie rental receipt, had been found in the vehicle that had been linked to the robbery-homicide and that these pieces of evidence implicated the defendant. Sergeant DeConcini was also aware of two telephone calls from a "Diana Murphey" who stated that "Rob" had told "Julie" and "LouAnne" that he had driven this vehicle and that he was planning to leave town soon by bus. This "Diana Murphey" had also stated that "Julie" and "LouAnne" resided at 2406 Fillmore Northeast. Sergeant DeConcini sent Minneapolis police officers to verify the tip. The officers went to 2406 Fillmore Northeast and did verify that the upper portion of the duplex was occupied by Julie and LouAnne Bergstrom and that Robert Olson was in fact staying there.

At the Rasmussen hearing the defendant, through counsel, contended that because there is no such person as "Diana Murphey" the statements from this person can not form the basis for probable cause to arrest the defendant. (There is a Dianna Joe Humphrey living at the address given by the informant, but Ms. Humphrey denied making any calls to Sergeant DeConcini or anyone in the Minneapolis Police Department.) The Court can not agree with this argument.

As a dispositive matter, the Court finds that Sergeant DeConcini had probable cause to order the defendant's arrest even without the information provided by "Diana Murphey". Sergeant DeConcini knew that a robbery-homicide had occurred at the Southeast Amoco Station one day earlier and that one suspect had been captured after a short car chase and that another male caucasian suspect was still at large. The sergeant knew that the vehicle which had been the subject of the brief chase, and which the two suspects had occupied, had been searched and that evidence had been discovered inside it linking the vehicle to the robbery-homicide and a Robert Olson to the vehicle. The Court finds that under these circumstances, Sergeant DeConcini, conditioned by his own observations and information, and guided by his police experience, could reasonably have believed that the defendant had been involved in the robbery-homicide at the Southeast Amoco Station of July 18, 1987, even without considering the information provided by "Diana Murphey".

The Court also finds that the information provided by "Diana Murphey" could properly be considered by Sergeant DeConcini for purposes of establishing probable cause even though the true identity of "Diana Murphey" was and remains unknown. The credibility of an (anonymous) informant's information may be established by sufficient corroboration of the details of the tip so that it is clear that the informant is telling the truth on this occasion. *State v. Causey*, 257 N.W.2d 288 (Minn. 1977). The Court finds that the police did sufficiently corroborate the information they received from "Diana Murphey".

The information that "Diana Murphey" gave to the police was that "Rob" was the driver of the getaway car and that he was planning to leave town soon on a bus. "Diana Murphey"

also told Sergeant DeConcini that "Rob" had admitted his involvement in the robbery-homicide to three people, two of whom were "Julie" and "LouAnne", who lived at 2406 Fillmore. The police went to 2406 Fillmore and verified that Julie and LouAnne Bergstrom did in fact live at that address. The police also confirmed that a Robert Olson was staying with Julie and LouAnne in their upper duplex apartment. Later that day before entering the residence to arrest the defendant, Sergeant DeConcini confirmed that there was a "Rob" in the premises at that time and that "Rob" wanted the police to believe that he had left the dwelling. Although the police did not confirm every aspect of "Diana Murphey's" tip, they did verify that two women named Julie and LouAnne lived at the address stated by "Diana Murphey", that a Robert Olson was staying with ther , and that a "Rob" was in the dwelling when Sergeant DeConcini called the residence and that "Rob" did not want the police to know that he was still there when the sergeant telephoned.

The Court concludes, based on the foregoing facts, that it was reasonable for Sergeant DeConcini to believe the credibility of an anonymous informant under these circumstances. Given the aspects of the tip that were corroborated and verified by the police, it was reasonable for Sergeant DeConcini to believe that the remainder of the information in the tip was reliable as well. The Court finds that the details of "Diana Murphey's" information were sufficiently corroborated so that it was clear to Sergeant DeConcini that this anonymous informant was telling the truth.

In conclusion, the Court finds that there was probable cause to arrest the defendant without a warrant. There was sufficient evidence discovered in the suspected getaway vehicle to establish probable cause against the defendant. The informa-

tion supplied by "Diana Murphey" was furthermore sufficiently corroborated by the police to justify Sergeant DeConcini's belief that the tip was true.

CONCLUSION

The Court has found that the defendant had no legitimate expectation of privacy in the dwelling at 2406 Fillmore. Therefore the defendant lacks the requisite standing to challenge the legality of the evidence procured from his arrest on Fourth Amendment grounds. The Court has also found that probable cause existed under the facts and circumstances of this case to justify the warrantless arrest of the defendant. Defendant's motion to exclude and suppress the evidence obtained as a direct or indirect result of his arrest on July 19, 1987 must there be and is hereby denied.

J.H.J.

APPENDIX D

C3-88-687

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Petitioner-Respondent,
vs.
ROBERT DARREN OLSON,
Respondent-Appellant.

STATE'S PETITION FOR REHEARING

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STATEMENT OF THE CASE

On February 11, 1988 Appellant was convicted of first degree felony murder, armed robbery and second degree assault in connection with the armed robbery of a gas station and murder of the station's manager. Appellant filed a Notice of Appeal on March 29, 1988. The parties submitted their briefs to this court in July and October, 1988. The court heard oral argument on January 11, 1989. On February 24, 1989 this court issued its opinion reversing Appellant's convictions and remanding the case for a new trial. *See State v. Olson*, —— N.W.2d —— (Minn. filed February 24, 1989, attached to this petition at Appendix pp. 1-12). From this decision the State of Minnesota petitions the court for rehearing pursuant to Minn.R.Civ.App.P. 140.01.

ARGUMENT

I. IN HOLDING THAT APPELLANT HAS STANDING TO CHALLENGE THE LEGALITY OF HIS ARREST, THIS COURT MISCONCEIVED A MATERIAL FACT AND MISAPPLIED EXISTING CASELAW; THE EFFECT OF THAT DECISION IS TO VIRTUALLY ELIMINATE THE STANDING REQUIREMENT IN MINNESOTA.

This court decided that, even though Olson did not own or rent the duplex, had merely slept on the floor there one night, and had no possessions there except for a change of clothes, Olson nevertheless had a reasonable expectation of privacy at 2406 Fillmore because (1) he had permission to stay there for an indefinite period and (2) he had the right to allow or refuse visitors entry (slip opinion, p.7). The court relied on *Jones v. United States*, 362 U.S. 257 (1960) to support its holding, stating that "this case is quite similar to *Jones*" (slip opinion, p.7). Because the court misconceived the record concerning Olson's right to exclude others from the duplex, its reliance on *Jones* was misplaced. Unless the decision is reconsidered and reversed, its effect is to virtually eliminate the standing requirement in Minnesota.

In *Jones v. United States*, 362 U.S. 257 (1960) the Supreme Court held that anyone legitimately on the premises where a search occurs has standing to challenge the legality of the search. The court significantly narrowed the *Jones* holding, however, in *Rakas v. Illinois*, 439 U.S. 128 (1978):

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.

439 U.S. at 142. The court nevertheless affirmed the *Jones* result, holding that Jones had a legitimate expectation of privacy in the apartment searched. Crucial to that decision was the fact that Jones had a key to the apartment. He could therefore come and go at will, and freely admit and exclude others: "Jones had complete dominion and control over the apartment and could exclude others from it." *Rakas v. Illinois*, 439 U.S. at 149.

This court's reliance on *Jones* was erroneous since the record does not support the court's assertion that Olson had the right to allow or refuse visitors entry to the dwelling. The only discussion of this issue in the record is the following brief exchange between Louanne Bergstrom and the defense attorney during the Rasmussen hearing:

> Q. And if somebody came over to see Mr. Olson, did he have your permission to admit them or refuse to admit them?
>
> A. I don't know. It was never discussed.
>
> Q. Had somebody come over to visit Mr. Olson, would you have allowed him to decide if that person would visit with him?
>
> A. If I saw no reason not to.

(R.192). Thus, there was no evidence at all that Olson had the right to refuse others entry; with respect to admitting entry to others, Bergstrom clearly retained the final authority. Nor did Olson have a key to the duplex, a fact which is extremely important. When a host gives his guest a key to his house, he is in effect saying, "my home is your home," and in fact the guest then does have complete control over the premises, as in *Jones*. Olson, however, did not have a key, could not enter without the presence of another occupant of the home, had no right to refuse entry to others, and had only that limited

authority to admit his friends as Louanne Bergstrom allowed him. Olson's interest in the duplex is far less than the kind of complete dominion and control required by the United States Supreme Court.

The practical effect of the decision is to weaken the standing requirement to the point where it virtually disappears. A defendant now may assert that his personal Fourth Amendment rights were violated by an arrest in any private home to which he has run to escape police if he can merely show that he has permission to be in the home and he and his "host" have not agreed on a departure time. This is merely a restatement of the "legitimately on the premises" standard which the Supreme Court rejected in *Rakas v. Illinois*.

Moreover, such a broad view of standing will greatly increase the invocation of the exclusionary rule. There is a "substantial social cost" of the rule: not only is "relevant and reliable evidence . . . kept from the trier of fact," resulting in some guilty persons going free, *Rakas v. Illinois*, 439 U.S. at 137, but widespread use of the rule also causes public outrage and distrust of the criminal justice system. If the police violated anyone's rights by entering the Bergstrom home, it was the Bergstroms'. Broadening Fourth Amendment protection to persons like Olson who have such a tenuous connection to a place is not worth that social cost.

II. THE COURT'S HOLDING THAT THE ARREST WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES SUGGESTS THAT THE COURT OVERLOOKED MATERIAL FACTS; THE OPINION'S ENCOURAGEMENT OF POLICE "STAKE-OUTS" GREATLY INCREASES THE DANGEROUSNESS OF MINNESOTA NEIGHBORHOODS.

As this court noted in its opinion, whether exigent circumstances exist to justify a warrantless arrest is to be determined by a consideration of all relevant circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984). In its analysis, however, the court misconceived or overlooked several important facts, which, when taken into consideration, compel the opposite result. Furthermore, by encouraging police to "stake-out" a home while trying to obtain a warrant, the court's opinion, if not reexamined and reversed, will greatly increase the dangerousness of Minnesota neighborhoods.

In holding that no exigent circumstances existed to justify the warrantless entry in this case, the court overlooked or misconceived the following facts:

1) The court gave too little weight to the seriousness of the offense. The offense involved in this case was murder, the gravest possible offense. In *Welsh v. Wisconsin*, 466 U.S. 740 (1984) the United States Supreme Court held that the gravity of the underlying offense is an extremely important factor to be considered in deciding whether exigent circumstances exist.

2) In assessing Olson's dangerousness, the court gave too much weight to the fact that Olson was not the one who pulled the trigger. The police suspected Ecker of committing a series of armed robberies. They had probable cause to believe that Olson aided Ecker in the commission of this robbery/murder. Their experience in the field led them to believe that Olson probably also participated in the planning of the offense. To the extent that the co-defendant approves of, and assists in, the commission of a serious, violent offense, a policeman in the field is justified in believing the co-defendant to be just as dangerous as the one who pulled the trigger.

3) The court misconceived the importance of the recovery of the murder weapon. Although the weapon used by co-

defendant Ecker was recovered, the police were justified in assuming that Olson too might be armed, for the following reasons: a) Found in Olson's car were two empty shoulder holsters for handguns, as well as a pellet gun and a knife; b) Olson had ample opportunity after his escape from police to obtain a firearm; and c) the offense which Olson helped commit was armed robbery and murder.

4) The court gave too little weight to the following facts, which, to a police officer in the field, may mean imminent flight of a suspect: a) Olson had successfully fled police once; b) police had received information that he might flee again; c) Olson's statement to Julie Bergstrom, "tell them I left," could be reasonably construed by officers as a statement of Olson's present intent to flee at that moment; and d) the seriousness of the offense and the fact that the co-defendant had been arrested makes flight more likely. *See Welsh v. Wisconsin*, 466 U.S. at 759 (White, J., dissenting) ("The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately.").

5) The court overlooked the difference between the time it takes to obtain an arrest warrant, i.e. a complaint, and a search warrant. Much more time is required to obtain a murder complaint than a search warrant since, not only is a judge required, but a county attorney must also be located; must review all the police reports, decide to issue the complaint; and have the documents typed and filed. When the complaint is sought during the weekend the time required is greater still.

6) The court erroneously concluded that the arrest was "planned in advance" (slip opinion, p.10). The arrest was the culmination of an ongoing, continuous investigation into the

identity and present location of Ecker's co-defendant. As far as the police knew, Olson might return to the duplex at any moment. *See United States v. Williams*, 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied* 445 U.S. 934 (1980) (Exigent circumstances existed for warrantless arrest in private home, "[F]or, while *subsequent* events indicated that the police officers had sufficient time and opportunity to obtain a search warrant; i.e., the appellant remained on the premises under surveillance for several hours before the arrest was made, when the officers first undertook the surveillance there is no evidence to suggest that they had any reason to believe they would have more than minutes to wait for the appellant's exit."). Moreover, police could not have obtained a murder complaint in the 45-60 minutes that elapsed before Olson returned.

The Court suggested that exigent circumstances did not exist for the warrantless arrest because officers could continue to "stake-out" the house while trying to obtain a warrant (slip opinion, pp.9-10). This assertion ignores the reality that to maintain a stake-out of a felon connected with an armed robbery and murder is extremely dangerous—to the police, to the defendant, to the other occupants of the house, and to the public at large. Had the police maintained a stake-out at the duplex for the several hours required to obtain a murder complaint (or even a search warrant), Olson, who knew he was involved in a robbery/murder, may well have become desperate to escape. The stake-out would give him time to explore his options, including an armed shoot-out with police or the taking of a hostage from within. Olson, desperate, may well turn on his friends, deciding that one of the Bergstroms must have reported his whereabouts to police. Meanwhile, the presence of numerous squad cars in a popu-

lated area not only disrupts local activities, but may well draw curious bystanders to the area where they could be harmed by the defendant's likely resistance to arrest. *See* 2 W.LaFave, *Search and Seizure* §6.1(f) at 605-06 (2d ed. 1987); *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987) ("It was safer to arrest Standridge immediately by surprise in his motel room, than to wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby or other public area of the fully occupied hotel should Standridge try to escape."); *United States v. Campbell*, 581 F.2d 22, 26 (2nd Cir. 1978) ("Moreover, had the officers decided to set up surveillance of the apartments while waiting for a warrant to be issued, they would have risked the possibility of detection by appellants. If appellants had been alerted to the presence of the police, they might well have had sufficient time to dispose of the stolen money and other evidence in their possession. Furthermore, the risk of an armed confrontation would have been heightened.").

"The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). The court's encouragement of stake-outs is not required by the Fourth Amendment and will have the effect of transforming our peaceful neighborhoods into armed camps whenever a felon chooses to hide out there. This court must reverse its ruling in the interests of public safety.

CONCLUSION

For the reasons stated herein the State respectfully requests pursuant to Minn.R.Civ.App.P. 140.01 that this court reconsider its decision and affirm Appellant's convictions.

DATED: March 3, 1989

Respectfully submitted,

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OPPOSITION

BRIEF

No. 88-1916

IN THE
Supreme Court of the United States

October Term, 1988

STATE OF MINNESOTA,

Petitioner,

v.

ROBERT DARREN OLSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

1. Relying on information provided by a fictitious informant, Minneapolis police officers directed Respondent's arrest in a dwelling where he temporarily resided. Prior to ordering Respondent's arrest, police officers took no steps to confirm the identity of the fictitious tipster or to investigate her credibility. Similarly, police officers did not attempt to obtain an arrest warrant before directing the storming of the home in which Respondent temporarily resided. Prior to his arrest, Respondent was given permission to stay indefinitely at this dwelling by its residents, had no immediate intention of leaving the premises, received guests at the home and, if he chose, had the right to exclude persons from the dwelling. Under these circumstances, did Respondent have a reasonable expectation of privacy in his temporary residence sufficient to enable him to challenge his warrantless arrest under the Fourth and Fourteenth Amendments to the United States Constitution?

2. On Sunday, July 19, 1987 Minneapolis police received information from a fictitious informant implicating Respondent in a robbery and murder which occurred the previous day. Minneapolis police officers took no steps to identify the informant, nor did they attempt to contact the persons claimed by the fictitious informant to have specific knowledge of Respondent's claimed involvement in the offense. Those individuals later testified at a pre-trial hearing that they had no information regarding the July 18, 1987 offense nor were they even acquainted with Respondent. Although, on Saturday, July 18, 1987, other police officers needed only two and one-half hours to obtain a search warrant for Respondent's ve-

hicle, Minneapolis police officers made no effort to secure an arrest warrant on July 19, 1987. The investigating officer testified at a pre-trial hearing that he did not do so because he did not wish to disturb local prosecutors during their leisure time. Although the July 18, 1987 offense did involve a violent crime, the murder weapon was recovered at the scene, police officers had no reason to believe that Respondent was armed or that his presence was endangering the residents of the home where he temporarily resided. The police were aware that Respondent was staying at this dwelling with the explicit consent of the building's tenants. There was no danger that delay in arresting Respondent would lead to the destruction of evidence; although a delay would have permitted the police to investigate the credibility of the fictitious tipster's information. Under these circumstances, do any exigent circumstances exist justifying the subsequent warrantless storming of Respondent's residence by police officers bearing shotguns and drawn revolvers?

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1916

STATE OF MINNESOTA,

Petitioner,

v.

ROBERT DARREN OLSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

OPINION BELOW

The Minnesota Supreme Court issued its Opinion reversing Respondent's conviction on February 24, 1989. This Opinion is reported at 436 N.W.2d 92 (Minn. 1989). It is also appended to this brief as Appendix A.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 24, 1989. The State subsequently filed a Petition for Rehearing on March 6, 1989. The Respondent served his Reply to that Petition for Rehearing on March 10, 1989; this document is reproduced and attached to this Brief as Appendix B. On March 29, 1989 the Minnesota Supreme Court denied the State's Petition for Rehearing. The State then filed its Petition for a Writ of Certiorari on May 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

On July 18, 1987 a lone gunman entered a service station in Minneapolis, Minnesota (RHT. 48-60).[1] During the course of an armed robbery, this person shot station manager Roger Reinhardt (T. 30). Mr. Reinhardt later died as a result of this gunshot wound (T. 217).

Immediately after the gunman fled the scene, the robbery and shooting were reported to law enforcement officials. Minneapolis police dispatchers summoned police units to the service station and broadcast information describing the robbery, shooting, and suspect's physical appearance (RHT. 48, 60). Two Minneapolis police officers, Officers Grabowski and Pihl, heard this report (RHT. 48, 60, T. 149). Officer Pihl believed the single suspect's general physical description and behavior matched that of Joseph Ecker, a suspect in other recent armed robberies (RHT. 60-61, T. 150). The officers traveled to Mr. Ecker's home at 2420 Polk Avenue N.E. (RHT. 60, T. 150).[2]

As the officers waited in an alleyway alongside the home, a brown Oldsmobile approached their squad car (RHT. 10, 64, T. 153). Officer Pihl immediately exited the squad car, drew his service revolver, and pointed it at the driver of the brown automobile (RHT. 11, 65, T. 154, 174).[3] Officer Grabowski

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[1] "RHT" refers to the transcript of the pre-trial suppression hearing conducted pursuant to Minnesota Rule of Criminal Procedure 11.02. This procedure is generally mandated by *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965). Consequently, this hearing is labeled a "Rasmussen" hearing and transcript references will be abbreviated "RHT" in this brief. "T" refers to the trial transcript.

[2] When officer Pihl came on duty at approximately 11:00 P.M. on July 17, 1987, he was presented with a "flyer" describing the previous robberies which identified Mr. Ecker as the sole suspect in those offenses (RHT. 62). This document listed Mr. Ecker's address as 2420 Polk Avenue N.E., Minneapolis, MN.

[3] Both Officers Grabowski and Pihl testified that they only observed one individual inside the vehicle at this time (RHT. 10).

reached into the rear of the police vehicle and began to remove a pump action shotgun (RHT. 11, T. 174). The brown automobile began backing away from the police car, turned in a "T portion" of the alleyway and proceeded "rapidly" northbound down the alleyway in apparent flight (RHT. 11, 66, 78, T. 154). Officers Pihl and Grabowski re-entered their patrol vehicle and began pursuing the brown Oldsmobile (RHT. 11, 65, 66). The driver lost control of the automobile as he attempted to exit the alleyway (RHT. 12, 16, 68, T. 155). As Officers Pihl and Grabowski approached the area, two individuals exited the Oldsmobile and fled on foot (RHT. 14, 69, T. 155). Officers Pihl and Grabowski attempted to chase these persons on foot, but quickly lost sight of each (RHT. 16-17, 69-71, T. 159). Within a few moments, other Minneapolis police officers arrived at the scene. These officers entered the house at 2420 Polk Avenue N.E. and emerged, in a few minutes, with Joseph Ecker in custody (RHT. 17-18, 72, T. 165). Mr. Ecker was later positively identified as the gunman who robbed the service station (T. 61, 86). Respondent's picture did not appear in the photographic lineup used to obtain Ecker's identification (T. 96).

Minneapolis police detective Robert R. Nelson arrived at 2420 Polk Avenue at approximately 6:15 A.M. (RHT. 98). Detective Nelson conducted a brief examination of the Oldsmobile and removed a Certificate of Title from the automobile. This Certificate identified the automobile's owner as Keith Jacobson (RHT. 99, T. 263-264). Detective Nelson also removed a letter from the vehicle. That letter was addressed to "Roger R. Olson" (RHT. 106, T. 225). It concerned an insurance claim from May, 1987 (T. 225). Detective Nelson then returned to 2420 Polk Avenue N.E. where he had separate conversations with Mr. Ecker and Dawn Corr, who was present in the house at the time Mr. Ecker was arrested (RHT.

102, 109). Neither individual identified Respondent as the driver or the passenger in the automobile which fled from Officers Pihl and Grabowski (RHT. 102, 109). Detective Nelson then attempted to locate the automobile's registered owner, Keith Jacobson, without success (RHT. 104, T. 226). Detective Nelson did not issue arrest orders for either Mr. Olson or Mr. Jacobson (RHT. 104, 131).

Detective Nelson later returned to his office and related his investigation and observations to Minneapolis police detective Michael Sauro. Detective Sauro promptly secured a search warrant for the Oldsmobile and the home at 2420 Polk Avenue N.E. (RHT. 87). Although this was a Saturday morning, Detective Sauro was able to obtain the search warrant within two and one-half hours (RHT. 87-88). Detective Sauro subsequently seized a variety of materials from the home and automobile. The only item found in the automobile which bore any connection with Respondent was a videotape rental slip dated July 16, 1987 (RHT. 85, 93, T. 367, 369).[4] When Detective Sauro executed the search warrant at 2420 Polk Avenue, he too found Dawn Corr present (RHT. 88). He interviewed Ms. Corr who stated that a number of people were with Mr. Ecker the previous evening (RHT. 89). Respondent was not included in that list (RHT. 89).

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[4] In its Petition, the prosecution asserts that a variety of documents were found in the vehicle linking Respondent . . . to the car." The prosecution's Petition also notes that "a pellet gun . . . a knife, a knife sheath and two empty shoulder holsters for handguns . . ." were also found in the vehicle. In reality, although the prosecution introduced a bounty of goods seized from the vehicle, the items bore no indication of ownership. Detective Sauro admitted that the shoulder holsters did not bear Mr. Olson's name or initials (T. 372) and that at least one of the holsters found in the trunk bore salt stains suggesting that it had been there for some time—long before Respondent's purchase of the vehicle (T. 371).

The following day, July 19, 1987, a woman identifying herself as "Diana Murphy" telephoned Minneapolis police detective James DeConcini and, for the first time, made direct accusations against Respondent. This informant apparently told officers that "a guy named Rob" was staying with "LouAnn" and "Julie" at 2406 Fillmore N.E. and had told someone named "Maria" that he was one of the men who had fled from police the preceding day (RHT. 113-114). Detective DeConcini was not familiar with the informant and took no steps to confirm her identity (RHT. 121, 123). Detective DeConcini conceded that he had 1986-1987 telephone directories available to him on July 19, 1987 but simply did not bother employing them to confirm the informant's identity (RHT. 123). Detective DeConcini admitted that if he had made this minimum effort he would have discovered that the name provided to him by this informant was, in fact, fictitious (RHT. 124). Detective DeConcini never spoke with "Maria," Julie or LouAnn Bergstrom to confirm the information provided by "Diana Murphy" (RHT. 122-125). He did, however, request Minneapolis police officers to travel to 2406 Fillmore Avenue N.E. to "locate Julie or LouAnn at that address and have one or both of those parties call me to verify the information given to me by Ms. Murphy" (RHT. 114).[5]

When officers first visited the home at 2406 Fillmore N.E., they discovered it was a duplex and that LouAnn and Julie Bergstrom resided in the upper unit. Neither Julie Bergstrom

[5] Interestingly, another witness, Officer VonLehe, contradicted Detective DeConcini's version of these events and stated that when Minneapolis police officers initially went to 2406 Fillmore on July 19, 1987, it was, at Detective DeConcini's instruction, for the express purpose of arresting Mr. Olson, not to get corroborating information (RHT. 142).

nor her mother, LouAnn, were home and officers spoke with the downstairs resident, Helen Niederhoffer (RHT. 114). Ms. Niederhoffer stated that a "party known to her as Rob Olson had been staying upstairs . . ." (RHT. 114). She agreed to telephone police when Mr. Olson returned (RHT. 115). Ms. Niederhoffer added that she was not privy to any conversation with Respondent regarding his alleged involvement in the July 18, 1987 robbery (RHT. 125). Ms. Niederhoffer telephoned Detective DeConcini at approximately 2:30 P.M. on July 19, 1987 and advised him that Mr. Olson had returned to the home at 2406 Fillmore (RHT. 137). Detective DeConcini then instructed Minneapolis police officers to surround the home and arrest Mr. Olson (RHT. 136-137). Detective DeConcini made no effort to obtain an arrest warrant prior to issuing this instruction (RHT. 127). Even though Detective Sauro had been able to procure a search warrant within two and one-half hours on the preceding day, Detective DeConcini stated that it never occurred to him to obtain an arrest warrant and that he had never attempted to secure an arrest warrant on a weekend during his twenty years as a Minneapolis police officer (RHT. 129-130). Detective DeConcini added that he was also reluctant to disturb local prosecutors on Saturday or Sunday and disrupt their leisure time (RHT. 116).

Acting at Detective DeConcini's direction, Minneapolis police officers entered the Bergstrom home and arrested Mr. Olson (RHT. 139).[6] When entering the home these officers did so with drawn revolvers and shotguns (RHT. 185-186, T. 542, 414). They did not seek consent of any occupant or resident before storming the building (RHT. 54, 145, 155,

[6] Respondent was arrested in an upstairs closet (T. 414). He did not threaten officers or resist arrest (T. 414).

198, 219, T. 413). Following Respondent's arrest, Minneapolis police officers transported Mr. Olson, LouAnn Bergstrom, Julie Bergstrom, and others seized at the premises to the Minneapolis Police Department Homicide office (RHT. 154, 165-166). While in custody, Respondent provided a statement to Sgt. Steven Sawyer, in which he admitted driving the brown Oldsmobile on July 18, 1987, but denied any involvement in the offense. Respondent stated that he was unaware of Mr. Ecker's intentions and was an innocent dupe (T. 389-396).

On August 11, 1987 the Hennepin County Minnesota Grand Jury indicted both Respondent and Joseph Ecker on charges of first degree felony murder contrary to Minnesota Statutes §609.185(3), aggravated robbery in violation of Minnesota Statutes §609.245, and second degree assault under Minnesota Statutes §609.222. At a pre-trial hearing Respondent timely moved to suppress his post-arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution. Respondent contended that the arrest was made without probable cause and that, even if police officers did possess probable cause, that Respondent had a legitimate expectation of privacy in his temporary residence. Consequently, Respondent contended that his warrantless arrest directly contravened the principles set forth by this Court in *Payton v. New York*, 445 U.S. 573 (1980). The State replied that it could rely on its fictitious informant to create probable cause and that Respondent lacked "standing" to raise the constitutional issues related to the invasion of the home at 2406 Fillmore. The State also asserted that even if Respondent could raise this claim, exigent circumstances justified the warrantless arrest.

The testimony produced at the pre-trial hearing unequivocally demonstrated that Respondent was an authorized guest at this home, intended to stay there indefinitely, and had the tenant's permission to do so. In addition, Mr. Olson kept a change of clothes at the premises and had the right to allow or refuse visitors' entry (RHT. 184, 192, 198, 217, 220). In particular, Mr. Olson testified:

Q. Did you intend to continue staying at that address?

A. Yes.

Q. Did you have any other place to stay?

A. No, I did not.

Q. Were you ever asked to leave by the Bergstrom's?

A. No, I was not . . .

Q. . . . When you talked to your friends, if you told them to meet you someplace, where would you tell them to meet you?

A. I told them to meet me at that address.

Q. If you told them to call you on the telephone, what number would you give them?

A. Julie's number (RHT. 217-218).

The Trial Court rejected each of Respondent's claims. It rebuffed Respondent's probable cause attacks by concluding "the information provided by Diana Murphy could properly be considered by Sgt. DeConcini for purposes of establishing probable cause even though the true identity of Diana Murphy was, and remains, unknown." The Court refused to consider Respondent's other challenge by concluding that he had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Avenue N.E. Interestingly, the Court based this determination, at least in part, on its conclusion that the Respondent was "a fugitive from a criminal investigation . . .

therefore . . . any expectation of privacy the Defendant may have had was unreasonable." [7]

On February 11, 1988 Respondent was convicted of one count of first degree felony murder, three counts of armed robbery, and three counts of aggravated assault. The jury acquitted Respondent of one count of first degree felony murder.[8] On March 29, 1988 Respondent appealed his conviction to the Minnesota Supreme Court. Respondent's Appeal alleged numerous errors warranting reversal of his conviction. The Minnesota Supreme Court addressed only one of those issues. It concluded that Respondent did possess a legitimate expectation of privacy in the dwelling at 2406 Filimore and that his warrantless arrest directly contravened the Fourth and Fourteenth Amendments to the United States Constitution. Accordingly, the Minnesota Supreme Court reversed Respondent's conviction and remanded this case for a new trial.

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[7] The Trial Court's conclusion that Respondent had no expectation of privacy because he was a subject of a criminal investigation is absolutely unsupportable. At the time Respondent began his stay at the Bergstrom home, he was not sought by police. Mr. Olson's arrest was not directed until *after* he began staying at the Bergstrom home. Moreover, even if literally true, the fact that an individual is the subject of a criminal investigation does not strip him or her of an expectation of privacy in certain places. In every instance where a Court has concluded that a warrantless arrest was unjustified, the individual arrested was the subject of a criminal investigation. If the person asserting a Fourth Amendment right was not the subject of a criminal investigation, he or she simply would not have been arrested. Holding that anyone who is the subject of a criminal investigation is bereft of any expectation of privacy in his or her dwelling will, by definition, emasculate the Fourth Amendment.

[8] The jury convicted Respondent of violating Minnesota Statutes §609.185(3) but acquitted him of a companion charge alleging a violation of Minnesota Statutes §609.185(1).

ARGUMENT

I. The Minnesota Supreme Court properly followed applicable decisions of this Court by concluding that Respondent had a reasonable expectation of privacy in his temporary dwelling sufficient to permit invocation of Fourth and Fourteenth Amendment safeguards.

The prosecution argues that Respondent "lacked a reasonable expectation of privacy in the duplex" where he was arrested (Petition, p. 11) and that the Minnesota Supreme Court's decision weakens the "standing requirement to the point where it virtually disappears" (Petition, p. 12). Certainly, Fourth Amendment rights are personal and may not be vicariously asserted. *Brown v. United States*, 411 U.S. 223, 230 (1973). For that reason, Respondent's ability to raise these constitutional claims require a right personal to him be transgressed. Traditionally Courts have viewed this concept as "standing" to challenge a search or seizure. Given the continuing evolution of constitutional law, the catch phrase "standing" is no longer entirely accurate. Beginning in *Katz v. United States*, this Court focused its analysis of the Fourth Amendment's scope on an individual's privacy expectations. Commenting that "the Fourth Amendment protects people, not places," this Court held that whenever a person possesses a reasonable expectation of privacy in a particular context, he can avail himself of the protection granted by the Fourth Amendment. 398 U.S. 347, 351 (1967).

The Petitioner initially contends that the Minnesota Supreme Court's decision is thematically inconsistent with *Rakas v. Illinois*, 439 U.S. 128 (1978).[9] (Petition, p. 12). The Minne-

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[9] *Rakas v. Illinois* narrowed an earlier decision, *Jones v. United States*, 362 U.S. 257 (1960). In the *Jones* decision, this Court concluded "anyone legitimately on the premises where a search occurs may challenge its legality." Id. at 267.

sota Supreme Court undoubtedly examined and considered *Rakas* before publishing its opinion. Indeed, the February 24, 1989 decision repeatedly cited *Rakas v. Illinois* in support of Respondent's claims. The Minnesota Supreme Court construed *Rakas* as rejecting "the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search . . ." but added ". . . this does not mean that a guest never has standing . . ." and "although the *Rakas* Court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case . . ." (A-8).

That construction of *Rakas* can hardly be considered inaccurate. In that decision, Chief Justice Rehnquist commented:

> We think that *Jones*, on its facts, merely stands for their unremarkable proposition that *a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable government intrusion into that place* (citations omitted). In defining the scope of that interest, we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees and the like ought not to control. (Emphasis supplied.)

439 U.S. at 142-143. Yet, the State's Petition expressly invites this Court to now reinvigorate those technical criteria as a focal point for Constitutional analysis. The prosecution argues that the mere fact that Respondent did not possess a key to the dwelling "is extremely important to consider . . ." (Petition, p. 11). Simply because Respondent did not possess a key, the State contends that there are "important factual differences between this case and *Jones* which the Minnesota Supreme Court overlooked . . ." (Petition, p. 10). Suggesting that a guest in a dwelling possesses a reasonable expectation

of privacy only if he has a key and "control of the premises" once again supplants privacy expectations with mechanistic concepts. The Petitioner asks this Court to strip away Respondent's subjective privacy expectation merely because he did not have a key to the premises.[10]

To permit an accused to challenge the validity of an arrest only if he or she possessed a key to the dwelling where the seizure occurred runs contrary to the analytical constructs of both *Rakas* and *Jones*. In particular, Chief Justice Rehnquist noted:

> . . . Capacity to claim the protection of the Fourth Amendment depends not on a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place (citations omitted). Viewed in this matter, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore can claim the protection of the Fourth Amendment with respect to a government invasion of those premises even though his interests in those premises might not have been a recognized property interest at common law.

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[10] Respondent's warrantless arrest is presumptively unlawful and the prosecution bears the burden of establishing the validity of that arrest. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). The State's Petition for a Writ of Certiorari blithely asserts that Respondent did *not* have a key to the premises. There is no support for that assertion in the *Rasmussen* hearing transcript. The Prosecutor failed to inquire, of any witness, including Respondent, if he received a key to the premises from LouAnn or Julie Bergstrom. Under the circumstances, if the State considered Respondent's receipt of a key to be crucial to the issue of "standing," it should have made this inquiry at that time.

Rakas v. Illinois, 439 U.S. at 143. Similarly, in *Jones v. United States*, this Court declared:

> We are persuaded that it is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures, subtle distinctions developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

362 U.S. 257, 265-266 (1960). Yet that is precisely what the State suggests this Court do by inviting it to find possession of a key as "crucial" to privacy expectations. (See Petition, p. 10.)[11]

Plainly, the Minnesota Supreme Court analyzed the testimony of all witnesses and properly concluded that Mr. Olson had a reasonable expectation of privacy in the premises at 2406 Fillmore. Its opinion noted that Mr. Olson kept a change of clothes at the premises, that he had permission to stay for

[11] Contrary to the State's assertion, possession of a key was apparently only one factor considered by this Court in *Jones*. See *Jones v. United States*, 362 U.S. at 259; *Rakas v. Illinois*, 439 U.S. at 141. This is hardly surprising. The author of this brief employs a cleaning person who possesses keys to my dwelling. This individual is present for but a few hours each month. She receives no guests, telephone calls or messages at this address. She does not sleep there nor consume meals on the premises. Incredibly, under the State's analytical framework, this cleaning person would have a greater expectation of privacy than Respondent simply because she has a key to the property.

an indefinite period, and that he had the right to allow or refuse visitors' entry (A-8).[12] These conclusions are amply documented in the pre-trial hearing transcript (RHT. 184, 192, 198, 217, 220).

Petitioner contends that the Minnesota Supreme Court's use of the exclusionary rule will provoke "public outrage and distrust of the criminal justice system," and "broadening the Fourth Amendment protection to persons like Respondent . . . is not worth that social cost" (Petition, p. 13). This argument is patently offensive. In their haste to arrest Mr. Olson without a warrant, Minneapolis police officers failed to follow even the simplest investigatory procedures, recklessly and negligently relied on false information from a fictitious informant, and directed the storming of a dwelling by armed officers bearing shotguns and revolvers. Now the prosecution suggests that prohibiting use of evidence derived from such conduct is likely to spur "public outrage," "distrust of the criminal justice system," and that protecting Respondent's rights is "not worth that social cost." [13] In *Mapp v. Ohio*, 367

[12] The State's Petition reluctantly admits "this case and *Jones* seem factually similar" (Petition, p. 10). Indeed, they are remarkably similar. In *Jones*, the accused had permission to stay at a friend's house, brought a change of clothes with him, and slept at his friend's apartment for "maybe a night." 362 U.S. at 259. The *only* apparent factual distinction between *Jones* and the present case is possession of a key.

[13] At the pre-trial suppression hearing, LouAnn Bergstrom testified that she opened the door of her home to police officers armed with drawn revolvers and shotguns and that she felt powerless to refuse them entry (RHT. 184-185).

Julie Bergstrom testified that she believed herself seized by police officers and described her treatment as follows: "They were holding me in a room upstairs when they were searching for Rob and a lady officer dragged me down the stairs against my will and another lady outside was searching under my skirt, lifting my skirt all the way up. My mom asked if she could drive us

U.S. 643, 659 (1961), this Court eloquently rebutted the underpinnings of this philosophy:

> . . . There is another consideration—the imperative of judicial integrity. The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse, its disregard of the charter of its own existence.[14]

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down to the police station and they refused. They said no, that we had to ride in the squad car. I figured that if we were being taken against our will, then they must have to read me my rights." (RHT. 198).

Not surprisingly, Miss Bergstrom testified that she believed herself mistreated and was frightened. However, she was mistreated and frightened by police officers—not Respondent (RHT. 200). Respondent respectfully suggests that inhibiting conduct of this nature by police officers is worth the "social cost" of the exclusionary rule. Apparently the Minnesota Supreme Court agrees.

[14] The Prosecution believes that the Minnesota Supreme Court's decision did not safeguard judicial integrity, but merely "weakened the standing" requirement to the point where it virtually disappeared. The prosecution contends that the Minnesota Supreme Court's decision is "simply the restatement of the 'legitimately on the premises' standard which this Court rejected in *Rakas v. Illinois*" (Petition, p. 12). Even a cursory reading of the Minnesota Supreme Court opinion belies this analysis. In its decision, the Minnesota Supreme Court explicitly noted "the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search . . ." (A-8). The Minnesota Supreme Court added "This does not mean that a guest never has standing . . ." (A-8) and ultimately concluded that Respondent had a reasonable expectation of privacy because (1) he had permission to stay at 2406 Fillmore for an indefinite period, (2) he had the right to allow or refuse visitors' entry, (3) that he had a change of clothes at the premises, (4) and that he had an actual expectation of privacy (A-8-9). The State's suggestion that the Minnesota Supreme Court held that Olson's position . . . as an overnight guest is alone sufficent to confer reasonable expectation of privacy in his host's home" is, consequently, not consistent with the express language of the opinion.

II. There is no conflict in principal between the decision of the Minnesota Supreme Court determining that Respondent had a reasonable expectation of privacy in the scene of his arrest and decisions of other State and Federal Appellate Courts.

The State of Minnesota contends that the issues raised in this case are "critical and recurring . . . in Fourth Amendment jurisprudence" (Petition, p. 14). Its Petition argues that "conflicts in principal are numerous among the various State and Federal Courts considering the issue" (p. 14). To buttress this claim, the State's Petition cites a variety of apparently inconsistent judicial decisions.

Although superficially compelling, the State's laundry list of lower Court decisions does not accurately portray the present status of judicial decision-making on this issue. As the State reluctantly admits, "the facts in each case are unique . . ." and ". . . no opinion appears to directly conflict with the Minnesota Supreme Court's decision" (Petition, p. 14). Obviously, suppression decisions are fact specific. Because a Court in one jurisdiction suppresses evidence while another refuses to do so does not mean that the state of jurisprudence is a mine field of confusion. It merely means that lower Courts are compelled to make their suppression decisions on an individual basis.

This does not mean that lower Courts are applying vastly-differing tests or standards to make that determination. Indeed, there is no doubt that lower Courts have readily adopted the general standard that an individual can raise a Fourth Amendment seizure challenge only when he or she has a legitimate expectation of privacy in a given area. See *United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988); *United States v.*

Echegoyen, 799 F.2d 1271 (9th Cir. 1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984); *State v. Reddick*, 207 Conn. 323, 541 A.2d 1209 (1988); *People v. Smith*, 420 Mich. 1, 360 N.W.2d 841 (1984).

In applying this general principal, lower Courts use remarkably similar criteria. Trial Courts consider a guest's legitimate presence at the scene, the extent of the accused's actual use or occupancy of the premises, right to exclude others, the defendant's subjective expectation of privacy in the area, the nature and degree of the accused's freedom to utilize the property, and his relationship with the actual owner or tenant. See *United States v. McIntosh*, 854 F.2d 466 (8th Cir. 1988); *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988); *United States v. Gerena*, 662 F.Supp. 1265 (D. Conn. 1987).[15]

Lower Courts recognize "whether a reasonable expectation of privacy exists is a determination to be made on a case-by-case basis." *State v. Reddick*, 541 A.2d at 1213. See also *United States v. Brock*, 667 F.2d 1311, 1320, n. 8 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Brown*, 635 F.2d 1207, 1211 (6th Cir. 1980). Consequently, the weight given these factors varies under the unique circumstances of each case. This explains the purportedly differing decisions outlined in the State's Petition (see Petition, p. 15). In some instances lower Courts have apparently regarded the duration and nature of a guest's stay alone as sufficient to confer a societally recognized privacy right. See *United States v. McIntosh*, 857 F.2d 466 (Defendant was a guest for several days prior to police entry). Other Courts have required Defendants

[15] Possession of a key is a factor employed by lower Courts in determining an individual's right to control or exclude others. It is not, however, determinative. *United States v. Aguirre*, 839 F.2d 831.

with a more tenuous connection to the dwelling to demonstrate other criteria designed to buttress their privacy claim.[16]

Standing alone, this flexible approach certainly fails to warrant this Court's involvement. Indeed, in its Petition the prosecution fails to advance any new test or criteria which it wishes this Court to adopt, nor does it explicitly suggest that the Minnesota Supreme Court overlooked any of the factors traditionally considered by the Courts in evaluating similar suppression issues. Rather, the essential thrust of the prosecution's claim is that the Minnesota Supreme Court simply erred in its assessment of the factual circumstances underlying Respondent's arrest, that it should have viewed the situation more favorably to the prosecution, and refused to suppress evidence. Claims grounded in a lower Court's resolution of disputed factual issues are ill-suited for issuance of Writs of Certiorari.[17] *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938), Reh. den. 305 U.S. 675.

[16] The State's Petition cites several decisions purportedly supporting the proposition that "other Courts hold that an overnight guest must also show a right to control access to the premises . . ." (Petition, p. 15). That interpretation of the cited decisions is questionable. For example, in *United States v. Aguirre*, the 1st Circuit concluded that the Defendant did not have a cognizable privacy interest in the dwelling because he could not establish prior usage. There was no evidence that he was, at the time of the seizure, an overnight guest. Similarly, in *United States v. Gomez*, the Defendant's challenge was rejected because he had effectively abandoned the premises. See *United States v. Aguirre*, 839 F.2d 854; *United States v. Gomez*, 770 F.2d 251 (1st Cir. 1985).

[17] Even assuming that some lower Courts have been too lenient in determining privacy expectations and that status as an overnight guest is, in no circumstances, sufficient to create a reasonable expectation of privacy, this case is not well suited to make this holding. The Minnesota Supreme Court relied on several factors, other than the duration of Mr. Olson's stay, to arrive at its conclusion. In addition to his overnight guest status, the Minnesota

III. The State of Minnesota has failed to establish the existence of an exigent circumstance justifying Respondent's warrantless arrest and the storming of the home in which he stayed.

Petitioner alleges that, even if Mr. Olson possessed a reasonable expectation of privacy in the dwelling at 2406 Fillmore, exigent circumstances justified his warrantless arrest. In particular, the prosecution asserts the Minnesota Supreme Court's decision is contrary to public policy, conflicts with other judicial decisions, and has a faulty basis. Once again, each of these claims is without merit.

A. The Minnesota Supreme Court's February 24, 1989 decision is not contrary to public policy.

The prosecution argues that the Minnesota Supreme Court's discouragement of warrantless arrests "is not required by the Fourth Amendment and will have the effect of transforming the peaceful neighborhoods into armed camps whenever a felon chooses to hide out there" (Petition, p. 20). Given the specific factual circumstances of Respondent's arrest, this allegation is, to say the least, amusing. The State's assertion that merely seeking an arrest warrant would transform the site of Mr. Olson's arrest into an "armed camp" begs several important questions. First, where would Mr. Olson have obtained a weapon? Although this was a violent crime, the murder weapon was recovered and the suspect who fled the scene was

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Supreme Court noted that Olson intended to stay for an indefinite period, had the right to allow or refuse visitors' entry, kept a change of clothes at the premises, and possessed a subjective expectation of privacy (A-8). Accordingly, adoption of some vaguely-defined yet more stringent standard, as requested by the prosecution, would not necessarily change the result in this case.

unarmed when observed by police. Second, police had no information from their fictitious tipster that Mr. Olson was armed nor did they have any reason to believe that the Bergstroms retained weapons in their home. The record before this Court is absolutely barren of any basis for the State's assertion that Mr. Olson had access to illegal firearms sources as the State now suggests. More importantly, Respondent was, indeed, unarmed when arrested.

Similarly, the State contends that if it delayed Respondent's arrest, he might have entered into an "armed shootout with the police or the taking of a hostage . . ." (Petition, p. 19). Certainly it would have been difficult for Mr. Olson to enter into a "shootout" with the police when he was unarmed. The occupants of the Bergstrom home did not feel threatened—he was their guest. Rather, the only hostages taken at the time of Mr. Olson's arrest were Julie Bergstrom and her mother LouAnn—who were seized and mistreated by police officers (RHT. 184-200).

The reality of this situation, as accepted by the Minnesota Supreme Court, mandates the conclusion that Mr. Olson's warrantless arrest was impermissible. Relying on uncorroborated and uninvestigated information from a fictitious informant, police directed Respondent's arrest. They did so without bothering to even attempt securing an arrest warrant. Officer DeConcini testified at the pre-trial suppression hearing that he had never attempted to obtain an arrest warrant during a weekend (RHT. 130) and added that one consideration underpinning his refusal to do so was his reluctance to disturb local prosecutors on Saturday or Sunday (RHT. 116). The Minnesota Supreme Court's decision properly emphasized to police officers that they should be equally sensitive to the liberty interests of citizens.

B. The Minnesota Supreme Court's February, 1989 decision is not thematically inconsistent with the decisions of other Courts.

The Petitioner argues that "several Courts disagree with the Minnesota Supreme Court's encouragement of a stake-out . . ." (Petition, p. 22). In support of this proposition, the State cites several decisions in which warrantless arrests have been sanctioned.

Once again, this argument is misconceived. Absent a specific constitutional exemption, Respondent's warrantless arrest inside a dwelling is presumptively unlawful. *Welsh v. Wisconsin*, 466 U.S. 740. The prosecution bears the burden of establishing that Respondent's arrest falls within one of the narrowly-defined exceptions to this constitutional prohibition. In weighing that obligation, this Court has specifically declared that "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or seizures." Id. at 749-750. In this action, the prosecution has sorely failed to voice the existence of any "exigent" condition which would sanction Mr. Olson's warrantless arrest. The exigent circumstances necessary to justify a warrantless arrest are those which gravely endanger the lives of the public or police officers. *United States v. Jones*, 635 F.2d 1357 (8th Cir., 1980). This does not mean simply that a violent or dangerous crime has occurred. This Court has generally restricted emergency conditions to hot pursuit of a fleeing felon, *United States v. Santana*, 427 U.S. 38 (1976); destruction of evidence, *Warden v. Haden*, 387 U.S. 294 (1967); or gunplay or danger of gunplay, *Michigan v. Tyler*, 436 U.S. 99 (1978).

Not surprisingly, the Minnesota Supreme Court concluded that none of these dangers or needs were present on July 19,

1987 when police made their warrantless entry into the home on Fillmore.[18] Although there may at one time have been a "hot pursuit" situation, that pursuit had long since concluded. There was no suggestion that Respondent possessed any evidence that was likely to be destroyed if his arrest was delayed while police attempted to obtain a warrant. Further, any danger of gunplay is at best speculative. While a gun was employed in the offense, it was recovered at the scene. Police officers observing the suspects' flight did not notice either carrying a weapon; there was no reason to surmise that Respondent possessed a weapon on July 19, 1987.

The State has never clearly explained which narrowly-tailored exception justified Respondent's warrantless arrest. The tenor of its argument is that since Respondent was involved in a serious offense, police were free to immediately direct his arrest once they had discovered his location and were under no compunction to first obtain an arrest warrant or at least attempt to procure a warrant. As such, the State's position is a direct assault on *Payton v. New York*, 445 U.S. 573 (1980). To mask the intrinsic nature of its argument, the State contends that the Minnesota Supreme Court's decision somehow improperly encourages stake-outs. This issue was convincingly addressed by the Minnesota Supreme Court which admitted "cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time

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[18] In determining whether exigent circumstances existed, the Minnesota Supreme Court explicitly employed the *"Dorman"* analysis examining (1) the gravity of the offense, (2) whether the suspect was reasonably believed to be armed, (3) the strength of the State's probable cause showing, (4) the certainty that the suspect is located in the premises about to be entered, and (5) the likelihood of escape if arrest is delayed. *Dorman v. United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970). Evaluating each factor the Court concluded that the State had simply not met its burden.

to obtain an arrest warrant." The Minnesota Supreme Court reviewed those decisions before issuing its opinion and explained:

> Again the differing circumstances explain the differing results. Sometimes a stake-out will adequately freeze the situation while on other occasions the ensuing delay may increase the dangers of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest . . . which occurs in the field as part of unfolding developments (citations omitted). Thus, in *Lohnes*, we pointed out that an arrest was the culmination of a rapidly-developing situation in the field with only thirty-five minutes elapsing . . . (A-11).

The Minnesota Supreme Court then examined the specific factual circumstances of Respondent's arrest. The Court reasonably concluded: (1) that police based their decision to arrest Mr. Olson on uncorroborated and uninvestigated allegations from a fictitious tipster; (2) this decision was made several hours before Mr. Olson's actual arrest; (3) police made no effort to obtain an arrest warrant before seizing Respondent; (4) police were able to obtain a search warrant as part of this same investigation within a few hours on the preceding day, Saturday; (5) and the State had failed to adequately explain why an arrest warrant could not have been obtained (A-12). The Minnesota Supreme Court decision seems thoroughly considered and consistent with the themes advanced by other Courts.

C. The Minnesota Supreme Court's February, 1989 decision is well-reasoned.

The Petitioner argues that the Minnesota Supreme Court "overlooked or misconstrued several important facts . . ." and that as a result, its decision was a product of "faulty reasoning" (Petition, p. 23). If misconception of facts exists, it is on the part of the prosecution. For example, the Petition alleges "police had reason to believe that Respondent still might possess a firearm . . ." What reason? The murder weapon was recovered shortly after the robbery. When Mr. Olson fled he was observed to be unarmed. Even the fictitious tipster did not allege that Mr. Olson possessed a firearm. Similarly, the State contends that the Minnesota Supreme Court "also overlooked the fact that it takes much longer to obtain an arrest warrant (i.e., a murder complaint) than a search warrant (Petition, p. 23).[19] This assertion is entirely unsupported by the trial record. Detective DeConcini never indicated that the time required to obtain an arrest warrant entered into his decision. Indeed, Detective DeConcini had no knowledge of the length of time necessary to obtain an arrest warrant during the weekend since he had never attempted to do so during his twenty years as a police officer. Detective DeConcini explained that he did not wish to disturb prosecutors during their vacation time. These excuses were, understandably, not warmly received by the Minnesota Supreme Court.

The prosecution next contends that "the necessity for quick police action arose after a telephone call into the duplex. . . . The police heard a male, presumably Respondent, instruct Julie to 'tell them I left.'" The prosecution suggests, from this statement, that "police could reasonably have decided that

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[19] The murder complaint initially filed against Respondent is less than four pages in length.

Respondent intended to flee . . ." and "police were justified in entering immediately to prevent Respondent's escape." (Petition, p. 24). Unfortunately, there is no evidence that Respondent ever instructed Julie Bergstrom to mislead police regarding his location.[20] Julie Bergstrom expressly denied hearing Respondent make any such statement (T. 543). Ms. Bergstrom added that the telephone call from Detective DeConcini occurred only after police entered the home to arrest Mr. Olson and that she was unaware of Respondent's location at that time (T. 543). Even Detective DeConcini acknowledged that he could not identify the voice he assertedly overheard (T. 434). Even if true, there is no judicial authority for the proposition that a criminal suspect's unwillingness to voluntarily surrender himself to police constitutes an exigent circumstance. The Minnesota Supreme Court specifically dealt with this concern in its opinion, noting "three or four Minneapolis police cars surrounded the house." The Court then added: "It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended." (A-11).

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[20] Julie Bergstrom, the individual at the other end of the telephone line, contradicted Detective DeConcini's version of the telephone conversation in which the Detective asserted hearing the male background voice. Ms. Bergstrom testified:

Q. Did you have a telephone conversation with Sgt. DeConcini?

A. I did have a conversation with an officer that day *after the police were already in my house.* (Emphasis supplied.)

Q. Did he instruct you or ask you to send Rob Olson outside?

A. Yes.

Q. Did you tell Mr. Olson that?

A. No . . . I don't even know where he was at the time . . . when the police came in I had no idea where he was (T. 543).

CONCLUSION

Respondent's right to be free from warrantless arrest finds its genesis prior to the enactment of the Constitution itself. In March, 1763, William Pitt the Elder addressed the House of Commons and proclaimed:

> The poorest man may in his cottage bid defiance to all forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement.[21]

The Minnesota Supreme Court vindicated Respondent's exercise of that right and its decision may strongly discourage police officers, in the future, from heedlessly ignoring constitutional dictates. For those reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court be denied.

Dated: _____

Respectfully Submitted,

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[21] See *Payton v. New York*, 445 U.S. at 602 n. 54.

APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT
C3-88-687

Hennepin County — Simonett, J.
Took no part, Keith, J.

STATE OF MINNESOTA,

Respondent,

vs.

ROBERT DARREN OLSON,

Appellant.

SYLLABUS

Warrantless entry of defendant's dwelling, in absence of exigent circumstances, requires suppression of defendant's statement and, hence, a new trial.

Reversed and remanded for a new trial.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

Defendant Robert Olson appeals his conviction for first degree murder, three counts of armed robbery, and three counts of second degree assault. He claims, among other things, that his arrest was illegal, lacking probable cause and accomplished by a warrantless entry of the place where he was staying. We conclude Robert Olson's constitutional rights were violated by the warrantless entry requiring suppression of tainted evidence, and reverse for a new trial.

On Saturday morning, July 18, 1987, shortly before 6 a.m., a lone gunman robbed an Amoco station in Minneapolis, shooting to death the station manager. The police were quickly alerted and, from the description of the robbery, suspected Joseph Ecker. Two officers drove to Ecker's home, arriving at about the same time as a brown Oldsmobile pulled up. The Oldsmobile tried to escape, spun out of control, and came to a stop. Two white males got out of the car and fled on foot. In short order one of the two men, who proved to be Joseph Ecker and who was identified as the robber-gunman, was captured inside his home. The other man, unidentified but described as tall, thin, a white male in his early twenties with sandy brown hair, escaped. It was now about 6:15 a.m.

Inside the abandoned Oldsmobile police found a sack of money and the weapon soon thereafter identified as the murder weapon. Also in the car was a title certificate showing the Oldsmobile's owner to be Keith Jacobson. The name Rob Olson appeared on the certificate as a secured party but with the name crossed out; the bottom half of the certificate, used to transfer title, was missing. There was also a letter in the car, dated May 11, 1987, from an insurance company, addressed to *Roger R.* Olson, 3151 Johnson Street. A second search of the car pursuant to a search warrant revealed a videotape rental receipt dated July 16, 1987 (2 days earlier), issued to Rob Olson. The police verified that a Robert Olson lived at 3151 Johnson Street. The police talked to Ecker and a woman who had been in the house when Ecker was arrested. Neither identified Robert Olson as having been in the getaway Oldsmobile or connected with the robbery. The woman gave the names of persons who had been with Ecker the night before; Olson's name was not among them. The police were unable to locate Keith Jacobson.

The next day was Sunday, July 19. In the morning a woman called the police and said a man by the name of Rob was the driver of the getaway car and was planning to leave town by bus. The caller gave her name as Dianna Murphy. About noon the woman called again, said she was Dianna Murphy, and gave her address and phone number. She said that a woman named Maria lived on Garfield Northeast and gave Maria's phone number. Maria, she said, had told her that a man named Rob had admitted to Maria and to two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller said Louanne was Julie's mother and the two women lived at 2406 Fillmore Northeast.

The detective-in-charge who took the second telephone call did not attempt to verify the identity of the caller. If he had, he would have learned no one by the name of Diana Murphy lived at the address and phone number given. Neither was Maria contacted. The detective did, however, send police officers to 2406 Fillmore to check out Louanne and Julie. The Fillmore address proved to be a duplex. Louanne Bergstrom and her daughter Julie resided in the upper unit but were not home. Louanne's mother (Julie's grandmother) lived in the lower unit. She confirmed that a Rob Olson had been staying upstairs and promised to call the police when Olson returned. The grandmother was not aware of Olson's involvement in any robbery. A pickup order was then issued for Olson's arrest.

About 2:45 p.m., the grandmother called police and said Olson had returned. The detective then instructed police officers to surround the house. No effort was made to obtain an arrest warrant. The detective later explained in court that he had never attempted to get an arrest warrant on a weekend during his 20 years on the force. After the house was surrounded, the detective phoned Julie and told her Rob should

come out of the house. The detective heard a male voice say "tell them I left." Julie then said that Rob had left, whereupon the detective ordered the police to enter the house. They did so with drawn weapons and without seeking permission. Defendant Olson, age 19, was found hiding in a closet.

After his arrest, defendant admitted to the police that he had driven Joseph Ecker from Ecker's house to an apartment building on Second Avenue Southeast near the Amoco station on University Avenue. Olson said Ecker had asked for a ride to pick up a girlfriend; that on the way he stopped at the Amoco station to buy cigarettes and pop; and that he then parked by the apartment building about a block from the station. He said Ecker was gone about 10 minutes and returned with a gun and a bag and ordered Olson to drive him home. Olson said he fled from the police at the Ecker house because he was scared of Ecker. Subsequent investigation disclosed that Olson had bought the Oldsmobile from Keith Jacobson but title had not yet been transferred. Defendant's defense at trial was that he had been duped into driving Ecker to the scene of the robbery.

The two main issues on appeal concern the legality of defendant's arrest. Was there probable cause? Did circumstances justify a warrantless, nonconsensual entry of the duplex? Defendant argues both these questions must be answered no, and, therefore, evidence obtained from his arrest—most importantly, his statement to the police—should have been suppressed.

I.

When police have arrested a suspect without a warrant, the test is whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably

could have believed that a crime had been committed by the person to be arrested. *State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978). A determination of whether the police had probable cause to arrest is a determination of constitutional rights, and this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *See Ker v. California*, 374 U.S. 23, 34 (1963).

At the time of defendant's arrest the police knew that a robbery-homicide had occurred. They had arrested one suspect, Joseph Ecker, and had a description of the unknown driver. In the getaway car was a certificate of title listing Keith Jacobson as the car's owner. The name Rob Olson was on the title certificate but as a secured party and the name was crossed out. A receipt for a videotape rental, dated 2 days earlier, was also in the car, issued to Robert Olson.

The trial court found that this physical evidence alone, without the informant's tip, was sufficient to establish probable cause. We have our doubts. As defendant points out, this evidence only suggested Olson might have had some property or lien interest in the getaway car and that he may have ridden in the car 2 days before the robbery. Keith Jacobson would seem to have been a more likely suspect. Significantly, although the police had this physical evidence on Saturday, they did not issue a pick-up order for Olson until Sunday, after receiving the telephone tip from "Dianna Murphy."

Consequently, the question becomes whether the tip was reliable and if it together with the physical evidence establishes probable cause. In evaluating an informant's tip, the court looks at the commonsense totality of the circumstances, including the informant's veracity, reliability, and basis of knowledge. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In this case, the police knew nothing about the informant's identity

or reliability. If the police had called the number "Dianna Murphy" gave them or checked her name in the telephone directory, they would have found there was no such person. The caller did not claim any personal knowledge of the information related, simply passing on what she had apparently been told by Maria, another unidentified source. On the other hand, the police did verify that at least part of the information given was correct, namely, that two women named Louanne and Julie lived at the address given and that a Rob Olson was staying there. The police also knew that the getaway car was connected in some way with a man named Rob Olson, which lent credence to the informant's statement that Rob Olson was the driver of the getaway car.

"[T]he fact that police can corroborate part of the informer's tip as truthful may suggest that the entire tip is reliable." *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). In *Siegfried*, however, the informant was known to the police as a reliable private citizen and had obtained the reported information by personal observation; further, the information had been accepted by a magistrate in granting an application for a search warrant. *See also State v. Wiley*, 366 N.W.2d 265 (Minn. 1985) (corroboration on a non-key item and informant had history of past reliability). The trial court here relied on *State v. Causey*, 257 N.W.2d 288 (Minn. 1977); but in *Causey* a magistrate had found probable cause for issuing a search warrant based on information supplied by a known reliable informant who accompanied the officer to the defendant's residence, where a car registered to a convicted drug possessor was parked. *Cf. State v. Eling*, 355 N.W.2d 286 (Minn. 1984) (police made extensive efforts verifying informant's identity and source of information). Nevertheless, there is force to the state's argument in this case that "Dianna

Murphy's" tip was sufficiently corroborated so that, together with other known information, there was probable cause.

A review of our cases reveals, what should come as no surprise, that the "totality of the circumstances" test is fact-specific. In this case we conclude we need not resolve the probable cause issue because the issue of warrantless entry, which we next discuss, proves to be dispositive.

II.

Defendant claims the warrantless entry of the duplex at 2406 Fillmore to seize him was a violation of his fourth amendment rights. The state counters that defendant lacks standing to make this challenge; but, even if standing exists, exigent circumstances justified the warrantless entry of the duplex. We conclude defendant's constitutional rights were violated.

It is unclear why an arrest warrant was not obtained in this case, particularly since we have encouraged law enforcement officers to obtain a warrant whenever possible. *See Merrill*, 274 N.W.2d at 108. The previous day, Saturday, the police had no difficulty in obtaining a search warrant for the car in 2 1/2 hours. Here, however, apparently no attempt was made to obtain an arrest warrant because it was Sunday, surely a curious reason for not observing the constitutional safeguards of citizens.

A.

For defendant Olson to challenge the warrantless entry and seizure of his person at Louanne's house, he must show a legitimate expectation of privacy in the upper duplex at 2406 Fillmore. *See State v. Brown*, 345 N.W.2d 233, 237 (Minn. 1984). For some days prior to the robbery, Olson had been living with Ecker at 2420 Polk. On Friday night he did not return to Ecker's house until 4:30 a.m., having been out on a

date. On Saturday night Olson did not return to Ecker's house, nor to his own, because he was afraid of being arrested; instead he stayed that night at Louanne Bergstrom's duplex. The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that Louanne Bergstrom testified Olson had the right to allow or refuse visitors entry. While the United States Supreme Court has rejected the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search, *Rakas v. Illinois*, 439 U.S. 128, 142 (1978), this does not mean that a guest never has standing. *See also United States v. Salvucci*, 488 U.S. 83 (1980) (overruling the holding in *Jones v. United States*, 362 U.S. 257 (1960) that possession of a seized good creates standing). Indeed, this case is quite similar to *Jones*, where an expectation of privacy was found. Jones had permission to stay at a friend's apartment; he had a key; he had a change of clothes; his home was elsewhere; and he had slept at the friend's apartment for "maybe a night." *Id.* at 259. Although the *Rakas* court subsequently qualified the rationale of *Jones*, it expressly reaffirmed the factual holding of that case. *Rakas*, 439 U.S. at 142-43. *See also Steagald v. United States*, 451 U.S. 204, 230-31 (1981) (Rehnquist, J., dissenting).

The trial court thought it significant that Olson was trying to evade the police so that his presence at 2406 Fillmore was "wrongful." Not so. A reasonable expectation of privacy is not forfeited (nor to be emasculated) because of the defendant's motives for seeking privacy. As LaFave explains, "to deny standing merely because it turns out the defendant had

a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 4 W. LaFave, *Search and Seizure* § 11.3(b) at 299 (2d ed. 1987).

Finally, the state argues that defendant had no *actual* expectation of privacy. In *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the United States Supreme Court said that to challenge an illegal search a defendant must have an actual expectation of privacy as well as one that society is prepared to recognize as reasonable. The trial court thought that defendant's statement to Julie, "tell them I've left," indicated that defendant had no actual expectation of privacy at 2406 Fillmore. We think not. This statement more likely suggests that defendant was simply attempting to discourage the police from invading his privacy by giving them a further reason, albeit of doubtful plausibility, not to enter the house.

We hold that defendant has standing to challenge the legality of his arrest.

B.

The right to be secure in the place which is one's home, to be protected from warrantless, nonconsensual intrusion into the privacy of one's dwelling, is an important fourth amendment right. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984); *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). To justify a warrantless arrest in a defendant's home, the state must show urgent need, *i.e.*, the presence of exigent circumstances. We make our own evaluation of the found facts (which in this case are not in dispute) in concluding whether exigent circumstances exist. *Storvick*, 428 N.W.2d at 58 n. 1. In making this determination, we have used the so-called *Dorman* analysis, with the understanding that the *Dorman* factors are part of a flexible approach that encompasses all relevant circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611

(Minn. 1984).[1] Thus, a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh*, 466 U.S. 740, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. *Lohnes*, 344 N.W.2d 605; *State v. Hatcher*, 322 N.W.2d 210 (Minn. 1982).

In this case the state claims exigent circumstances for a warrantless arrest in Louanne's duplex because defendant was a suspect in a murder, guns had been found in the getaway car, defendant had fled the police once, and there was information that he might try to flee again.

While it is true a grave crime was involved, it is also true that the suspect was known not to be the murderer but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of the unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had stayed the previous night. The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday.

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[1] The *Dorman* analysis considers: (a) whether the offense is a grave offense, particularly a crime of violence; (b) whether the suspect is reasonably believed to be armed; (c) whether the showing of probable cause connecting the defendant to the offense is more than minimal; (d) whether the police have strong reason to believe that the suspect is in the premise being entered; and (e) whether there is a likelihood that the suspect will escape if not swiftly apprehended. *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).

We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended. This case is unlike *Lohnes*, for example, where the suspect was believed to have committed the crime of violence, probable cause was strong, and the weapon had not been found. In *Lohnes*, too, the dwelling was in an isolated rural area, distant from a magistrate, the time 5 a.m., and it was doubtful if sufficient police resources were on hand to contain the suspect until an arrest warrant could be obtained. *Lohnes*, 344 N.W.2d at 611-12.

Cases from other jurisdictions are split on whether surveillance or a stake-out should be used to gain time to obtain an arrest warrant. *See* 2 W. LaFave, *Search and Seizure* § 6.1(f), at 605-08 (2d ed. 1987). Again, the differing circumstances can explain the differing results. Sometimes a stake-out will adequately freeze the situation, while on other occasions the ensuing delay may increase the chance of escape or danger to others. LaFave suggests a distinction between an arrest which is planned in advance and an arrest in medias res, which occurs in the field as part of unfolding developments. *Id.* Thus, in *Lohnes*, we pointed out that the arrest was the culmination of a rapidly developing situation in the field, with only 35 minutes elapsing from the time the sheriff attempted to locate the suspect to the warrantless arrest of the suspect at his home. *Lohnes*, 344 N.W.2d at 611. *See also Welsh*, 466 U.S. at 761 (White, J., dissenting) ("The decision to arrest without a warrant typically is made in the field under less-than-optimal circumstances * * *."). Where, however, the arrest is planned in advance, it is less likely the police can claim exigent circumstances.

Shortly after 1 p.m. on Sunday the detective in charge talked with Julie's grandmother on the telephone and learned that a Rob Olson "had been staying upstairs for a day or two with Louanne and Julie," and he obtained the grandmother's promise to call if Rob returned to the house. At 2 p.m. the detective issued a pick-up order for Olson, what he called a "probable cause arrest bulletin." The police were instructed to stay away from the duplex. At 2:45 p.m. the grandmother called the detective again to report Rob had returned. Squad cars were sent to the duplex and, at 3 p.m., the detective (coordinating the arrest efforts from headquarters by radio and telephone) ordered entry of the duplex. Olson was brought to headquarters within an hour. By then the detective who had been in charge was gone. He went off duty at 3 p.m. At least by 2 p.m., then, the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour, or within a relatively short time thereafter; on the other hand, the state has not suggested the warrant could not have been obtained. We do know a search warrant was obtained on Saturday, the day before, in 2 1/2 hours when the urgency to search an already impounded car was much less.

A warrantless, nonconsensual intrusion of one's dwelling is not to be lightly regarded; indeed, such an entry is considered presumptively unreasonable, and the United States Supreme Court has stressed the state bears a "heavy burden" to establish exigent circumstances. *Welsh*, 466 U.S. at 749. In this particular case, considering all the circumstances, we do not think that burden has been met. We hold defendant's fourth amendment rights were violated.

C.

Defendant asks that all evidence obtained from the illegal arrest be suppressed. This includes Olson's statement, the statements of all persons present at 2406 Fillmore at the time of his arrest, and Joseph Ecker's statement which was obtained after the police showed him Olson's statement. Evidence obtained as a result of an illegal arrest must be suppressed unless it is obtained by means sufficiently distinguishable from the illegal exploitation to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Here Olson was taken immediately to police headquarters, and the police obtained a statement from him within an hour of his illegal arrest. We believe the statement was tainted and must be suppressed.

While the state has not argued that Olson's statement was untainted, it does argue that admission of Olson's statement at trial was harmless beyond a reasonable doubt. *See State v. Forcier*, 420 N.W.2d 884, 886-87 (Minn. 1988). There was other evidence, says the state, to establish that Olson was the driver of the getaway car, and Olson's statement had no significant impact on the guilty verdicts. At trial, however, the state relied heavily on various details in Olson's statement to point out discrepancies in his story; these discrepancies were then used to argue that Olson was lying about being duped by Ecker. For example, in his statement Olson said he was in the Amoco station about 10 minutes before the robbery to buy cigarettes and pop but the surveillance videotape showed no customer in the store at that time. In final argument, the prosecutor told the jury, "Now the proof of the pudding here, ladies and gentlemen, is in this statement"; and the prosecutor then went on, point by point, to show where Olson's statement did not appear to square with other facts. Olson's cred-

ibility was a key issue at trial and use of his statement obtained as a result of the illegal arrest was not harmless error.

We reverse and remand for a new trial. As we have mentioned, defendant claims there is other evidence which should also be suppressed along with his statement. He supports his claim only by assertion, and the record before us is unenlightening. The trial court on remand will be in a better position to deal with these claims. We need not reach other issues raised by defendant in this appeal.

Reversed and remanded for a new trial.

KEITH, Justice, took no part in the consideration or decision of this case.

APPENDIX B

C3-88-687

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Petitioner-Respondent,
vs.
ROBERT DARREN OLSON,
Respondent-Appellant.

DEFENDANT'S REPLY TO STATE'S PETITION FOR REHEARING

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STATEMENT OF THE CASE

For purposes of this Reply, Appellant accepts the Statement of the Case contained in the State's Petition for Rehearing (State's Petition, p. 1).

ARGUMENT

I. This Court properly concluded that Appellant's warrantless arrest on July 19, 1987, invaded his Fourth Amendment right.

The State argues that Appellant does not have "standing" to challenge the unlawful nature of his arrest and that this Court's decision virtually eliminates "the standing requirement" in Minnesota. Certainly Fourth Amendment rights are personal and may not be vicariously asserted. *Brown v. United States*, 411 U.S. 223, 230 (1973). Accordingly, Appellant's challenge in this proceeding requires that a right, personal to him under that amendment be transgressed.

Traditionally courts have viewed this concept as "standing" to challenge a search or seizure. Given the continuing evolution of constitutional law, the catch phrase "standing" is no longer entirely accurate. Beginning in *Katz v. United States*,

the Supreme Court focused its analysis of the Fourth Amendment's scope on an individual's privacy expectations. Commenting that "the Fourth Amendment protects people not places" the Supreme Court explained that whenever a person possesses a reasonable expectation of privacy in a particular context he can avail himself of the protection granted by the Fourth Amendment. 389 U.S. 347, 352 (1967).

In essence, the State simply challenges this Court's conclusion, that Mr. Olson possessed a legitimate expectation of privacy in the home located at 2406 Fillmore. The State advances no new arguments in support of this assertion. Rather the State's Petition repeatedly suggests that this Court's decision is thematically inconsistent with *Rakas v. Illinois*, 439 U.S. 128 (1978).

Presumably this Court examined and considered *Rakas* before publishing its opinion. Certainly both parties cited that decision in their Briefs.[1] The Court's February 24, 1989 decision repeatedly cited *Rakas v. Illinois* in support of Appellant's claims. Indeed, that opinion construed *Rakas*, as rejecting "the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search. . ." but added ". . . this does not mean that a guest never has standing . . ." and "although the *Rakas* court subsequently qualified the rationale of *Jones* it expressly reaffirmed the factual holding of that case . . ." (A. 7).

That construction of *Rakas* can hardly be considered inaccurate. In that decision Chief Justice Rehnquist commented:

> We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so

[1] Appellant's July 25, 1988 Brief cites that decision at p. 21, the State's September 27, 1988 Brief cites *Rakas* at p. 17.

> that the Fourth Amendment protects him from unreasonable government intrusion into that place (citations omitted). In defining the scope of that interest we adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensee's, invitee's and the like ought not to control.

439 U.S. at 142-143. Yet the State's Petition expressly invites this Court to reinvigorate these technical criteria as a focal point of constitutional analysis. From the State's perspective, Appellant had no reasonable expectation of privacy in this dwelling simply because he did not have a key to the premises. (State's Petition, p. 3).[2] Suggesting that a guest in a dwelling possesses a reasonable expectation of privacy only if he has a key and "complete control over the premises" once again supplants privacy expectations with mechanistic concepts. To permit an accused to challenge the validity of an arrest only if he or she possessed a key to the dwelling where the seizure occurred runs contrary to the analytical constructs of both *Rakas* and *Jones*. In particular, Chief Justice Rehnquist noted:

> . . . capacity to claim the protection of the Fourth Amendment depends not on a property right in the invaded place but upon whether the person who claims the

[2] Appellant's warrantless arrest is presumptively unlawful and the prosecution bears the burden of establishing the validity of that arrest. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). The State's Petition for Rehearing blithely asserts that Appellant did *not* have a key to the premises. There is no support for that assertion in the Rasmussen Hearing Transcript. Unfortunately the prosecutor failed to inquire, of any witness, including Appellant, if he received a key to the premises from Louanne or Julie Bergstrom. Under the circumstances, if the State considered Appellant's receipt of a key to be crucial to the issue of "standing" it should have made this inquiry at the time.

> protection of the Amendment has a legitimate expectation of privacy in the invaded place (citations omitted). Viewed in this manner the holding in *Jones* can thus be explained by the fact that *Jones* had a legitimate expectation of privacy in the premises he was using and therefore can claim the protection of the Fourth Amendment with respect to a government invasion of those premises even though his interests in those premises might not have been a recognized property interest at common law.

Rakas v. Illinois, 439 U.S. at 143. Similarly in *Jones v. United States*, 362 U.S. 257 (1960) the United States Supreme Court declared:

> We are persuaded however that it is unnecessary and ill advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . Distinctions such as those between 'lessee', 'licensee', 'invitee', and 'guest' often only of gossamer strength ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

Id. at 265-66.

Yet that is precisely what the State suggests this Court do by inviting it to find possession of a key as "crucial" to privacy expectations.[3] Plainly, this Court analyzed the testimony

[3] Contrary to the State's assertion possession of a key was only one factor apparently considered by the Court in *Jones v. United States*. See *Jones v. United States*, 362 U.S. at 259, *Rakas v. Illinois*, 439 U.S. at 141. This is hardly surprising. The author of this document employs a cleaning person who possesses keys to my dwelling. This individual is present for but a few hours each

of all witnesses and properly concluded that Mr. Olson had a reasonable expectation of privacy in the premises at 2406 Fillmore. Its opinion noted that Mr. Olson kept a change of clothes at the premises, that he had permission to stay for an indefinite period, and that he had the right to allow or refuse visitors entry. (A. 7). These conclusions are amply documented in the Rasmussen Hearing Transcript (R.H.T. 184, 192, 198, 217, 220). In particular Mr. Olson testified:

Q: Did you intend to continue staying at that address?

A: Yes.

Q: And did you have any other place to stay?

A: No, I did not.

Q: Were you ever asked to leave by the Bergstroms?

A: No, I was not . . .

Q: . . . When you talked to your friends, if you told them to meet you some place, where would you tell them to meet you?

A: I told them to meet me at that address.

Q: If you told them to call you on the telephone, what number would you give them?

A: Julie's number. (R.H.T. 217-218).

In reality, the focus of the State's complaint is that this Court's use of the exclusionary rule will provoke "public outrage and distrust of the criminal justice system" and "broadening Fourth Amendment protections to persons . . . like Olson is not worth that social cost." (State's Petition, p. 4). This argument is patently offensive. In their haste to arrest Mr. Olson without a warrant, Minneapolis Police Officers failed

month. She receives no guests, telephone calls or messages at this address. She does not sleep there nor consume meals on the premises. Incredibly, under the State's analytical framework, this cleaning person would have a greater expectation of privacy than Appellant simply because she has a key to the property.

to follow even the simplest investigatory procedures, recklessly and negligently relied on false information from a fictitious informant, and directed the storming of a dwelling by armed officers bearing shotguns and revolvers. Now the State suggests that prohibiting use of evidence derived from such conduct is likely to spur "public outrage", "distrust of the criminal justice system", and that protecting Appellant's rights is "not worth that social cost." [4] In *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), the United States Supreme Court eloquently rebutted the underpinnings of this philosophy:

> . . . There is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse its disregard of the charter of its own existence.

II. The State has failed to establish the existence of any exigent circumstance justifying Appellant's warrantless arrest.

[4] At the Rasmussen Hearing Louanne Bergstrom testified that she opened the door of her home to police officers armed with drawn revolvers and shotguns and that she felt powerless to refuse them entry (RHT. 184-185). Julie Bergstrom testified that she believed herself seized by officers and described her treatment as follows:

> . . . They were holding me in a room upstairs when they were searching for Rob and a lady officer dragged me down the stairs against my will and another lady outside was searching under my skirt, lifting my skirt all the way up. My mom asked if she could drive us down to the police station and they refused. They said no, that we had to ride in the squad car. I figured that if we were being taken against our will then they must have to read me my rights. (RHT. 198).

Not surprisingly, Ms. Bergstrom testified she believed herself mistreated and was frightened. However she was mistreated and frightened by police officers—not Appellant (RHT. 200). Appellant respectfully suggests that inhibiting conduct of this nature by police officers is worth the "social cost" of the exclusionary rule.

The State's petition also asserts that even if Appellant has authority to assert a Fourth Amendment claim in this instance, exigent circumstances sanctioned his warrantless arrest. Each one of those "exigent circumstances" was mentioned in the State's initial Brief (Respondent's Brief, p. 18 n. 6). Appellant's Reply Brief noted the rather obvious shortcomings in the State's position (Appellant's Reply Brief, pp. 10-12). Accordingly, this portion of the State's Petition for Rehearing does nothing but reiterate arguments which have already been rejected by this Court (A. 9-10).

Ignoring the specific factual circumstances of Mr. Olson's arrest, the State's Petition engages in a stream of speculative rhetoric in a blatant attempt to disguise the reality of police conduct. For example, the State admits that the weapon involved in this action was recovered but asserts that "police were justified in assuming that Olson too might be armed . . ." because "Olson had ample opportunity after his escape from police to obtain a firearm. . .". This speculation begs several important questions. First, where could Mr. Olson have obtained such a weapon? Certainly if he had returned to the home at 2420 Polk Avenue he would have been arrested with Mr. Ecker. Second, police had no information from their fictitious tipster that Mr. Olson was armed nor did they have any reason to believe that the Bergstrom's retained weapons in their home. The record before this Court is absolutely bereft of any basis for the State's assertion that Mr. Olson had access to illegal firearms sources as the State now suggests. Most importantly, Appellant was, indeed, unarmed when arrested.

Similarly, the State contends that if it delayed Appellant's arrest he might have entered into "an armed shootout with the police or the taking of a hostage. . ." Certainly it would have been difficult for Mr. Olson to enter into a "shootout" with

police when he was unarmed. The occupants of the Bergstrom home did not feel threatened by Mr. Olson—he was their guest. Rather the only "hostages" taken at the time of Mr. Olson's arrest were Julie Bergstrom and her mother Louanne—who were seized and mistreated by police officers. (RHT. 184-200).

Finally, the State argues that the County Attorney's need for leisure time constitutes an "exigent circumstance." (State's Petition, p. 6). This argument is certainly consistent with the Rasmussen Hearing testimony of Detective DeConcini who stated that he had never even attempted to obtain an arrest warrant during a weekend (RHT. 130) and added that one consideration underpinning his refusal to do so was his reluctance to disturb county attorneys on Saturday or Sunday. (RHT. 116). This Court's decision properly emphasized to police officers that they should be equally sensitive to the liberty interests of citizens.

CONCLUSION

For the foregoing reasons Appellant respectfully requests that this Court deny the State's Petition for Rehearing and award attorney's fees in the amount of $500.00 pursuant to Minn. R. Civ. App. P. 140.03.

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